2485

No. 11688

United States
Circuit Court of Appeals
For the Ninth Circuit

THOMAS H. BRODHEAD, doing business as T. H. Brodhead Co.,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector of the Territory of Hawaii,

Appellee.

Transcript of Record

Upon Appeal from the Supreme Court for the Territory of Hawaii

Rotary Colorprint, 870 Brannan Street, San Francisco 8-30-47—60

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SMITH, WILD, BEEBE & CADES,
MILTON CADES,

Bishop Trust Building,
Honolulu, T. H.,

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C. NILS TAVARES, ESQ.,

Attorney General,
Territory of Hawaii,
Iolani Palace,
Honolulu, T. H.,

Attorney for Defendant-Appellee. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

L. No. 17365

At Term In Law

THOMAS H. BRODHEAD, d.b.a
T. H. BRODHEAD CO.,

Plaintiff,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector,

Defendant.

Action to Recover Gross Income Taxes
Paid Under Protest

COMPLAINT

To the Honorable, the Presiding Judge, at Term, of the Circuit Court of the First Judicial Circuit, Territory of Hawaii:

Comes now Thomas H. Brodhead, doing business as T. H. Brodhead Co., plaintiff above named, and for cause of action against the defendant above named, alleges as follows:

I.

That plaintiff is, and at all times hereinafter mentioned was, a resident of Honolulu, City and County of Honolulu, Territory of Hawaii; and that the plaintiff above named is the general partner of a registered special partnership, doing business in

Honolulu aforesaid under the firm name and style of T. H. Brodhead Co.

II.

That defendant above named is and was at all relevant times the duly appointed, qualified and acting Tax Commissioner of the Territory of Hawaii, and as such is and was at all relevant times in charge of the administration and enforcement of Act 141 (Series A-44) of the Session Laws of Hawaii 1935, as [4] amended from time to time (hereinafter referred to as the General Excise Tax Law); and with respect to any money representing a claim for the Territory for taxes pursuant to said General Excise Tax Law was a public accountant of the Territory of Hawaii within the meaning of Section 571 of the Revised Laws of Hawaii 1935.

III.

That plaintiff duly made monthly gross income tax returns for each of the months of October, 1942, to March, 1944, inclusive, and annual returns of gross income tax for each of the years 1942 and 1943, showing the matters and information required to be shown, and duly filed the same with the proper officers of the Territory of Hawaii in every respect in conformity with and in compliance with the laws of the Territory of Hawaii in that behalf made and provided, and duly paid the gross income tax on his gross income based on the amounts of gross income reported in said returns as and when the same were due and payable.

IV.

That on or about May 2, 1944, the proper officer of the Territory of Hawaii, upon whom rests the duty of assessing gross income tax, caused to be assessed an additional tax on gross income for the period beginning October 1, 1942, and ending December 31, 1942, in the amount of $1,996.60, for the period beginning January 1, 1943, and ending December 31, 1943, in the amount of $6,701.28, and for the period beginning January 1, 1944, and ending March 31, 1944, in the amount of $1,728.07, a total of $10,425.95; that the whole amount of such additional gross income tax so assessed was occasioned by increasing the gross income tax on account of retail sales and the gross income tax payable on account of such sales by the following amounts: [5]

	Gross Income	Tax
October 1 to December 31, 1942:		
Retail Sales to Post Exchanges	$49,602.24	$ 744.03
Retail Sales to Ship's Service Stores	81,383.69	1,220.76
Other sales to the United States and/or its instrumentalities, departments, or agencies	2,120.40	31.81
January 1 to December 31, 1943:		
Retail Sales to Post Exchanges	$155,266.67	$2,329.00
Retail Sales to Ship's Service Stores	291,044.42	4,365.67
Other Sales to the United States, etc.	440.67	6.61
January 1, to March 31, 1944:		
Retail Sales to Post Exchanges	$33,444.20	$ 501.66
Retail Sales to Ship's Service Stores	81,036.44	1,215.55
Other sales to the United States, etc.	723.99	10.86

that the notices of proposed change in gross income

and/or consumption tax notifying plaintiff of the said additional assessment of said gross income tax for said periods were dated May 2, 1944, and were signed by W. Borthwick, Tax Commissioner, by T. Westly.

V.

That on May 2, 1944, or within a short period of time after said date, defendant demanded that plaintiff pay the said sum of $10,425.95 as and for an additional assessment of gross income tax for the period October 1, 1942, to March 31, 1944.

VI.

That plaintiff, on May 14, 1944, pursuant to the aforesaid demand, involuntarily and under duress, and to avoid the heavy penalties for failure to pay the said tax within twenty-one (21) days from the date of the said notice of additional gross income and/or consumption tax assessment, paid the aforesaid sum of $10,425.95 under protest, a copy of which protest is attached hereto, made a part hereof for every purpose, and is marked Exhibit "A." [6]

VII.

That the aforesaid sum of $10,425.95 as additional assessment of gross income tax for the period October 1, 1942, to March 31, 1944, was wrongfully and illegally demanded and collected by defendant from plaintiff for the following reasons:

(1) That the amount of $691,777.66 claimed by defendant as the additional amount taxable at the retail rate of 1½% represents sales to United States Post Exchanges and Ship's Service Stores; and the amount of $3,285.06 claimed by defendant as the additional amount taxable at the retail rate of 1½% represents sales to the United States and/or other instrumentalities, departments or agencies;

(2) That said sales to the United States and/or its agencies or instrumentalities are exempt from gross income tax under the provisions of the General Business Excise Tax Law of the Territory of Hawaii under which the taxes in question are purported to be assessed;

(3) That the imposition of the gross income tax on such sales by defendant is in violation of Article I, Section 8, Clauses 12 and 13, of the Constitution of the United States in that said tax is a direct burden on the Federal Government in the exercise of its essential governmental power of raising and supporting armies and of providing and maintaining a Navy;

(4) That the imposition of said tax by the Territory of Hawaii retards, impedes and burdens the operation of constitutional laws duly enacted by Congress for the purpose of carrying into execution essential governmental powers vested in the Government of the United States, which is in direct violation of the provisions of said Article I, Section 8, Clauses 12 and 13, of the Constitution of the

United States, and Section 55 of the Hawaiian Organic Act; [7]

(5) That the imposition of said tax is in violation of the Fifth Amendment of the Constitution of the United States in that it deprives the taxpayer of property without due process of law;

(6) That said tax purports to be a tax on the privilege of engaging in the business of selling to the United States for essential governmental purposes, and as such it constitutes a tax on a privilege which the Territory of Hawaii does not confer, and thereby is in violation of the Fifth Amendment of the United States Constitution in that it deprives the taxpayer of property without due process;

(7) That the imposition of said tax violates Section 55 of the Hawaiian Organic Act in that it imposes a direct tax on the privilege of carrying on business with the United States, which is a subject beyond the legislative power of the Legislature of the Territory of Hawaii in that it is not a rightful subject of legislation and is inconsisted with the Constitution and laws of the United States;

(8) That in no event can the gross income from sales to the Ship's Service Stores or other agencies or instrumentalities of the United States be taxed at more than ¼ of 1% when such sales to said agencies or instrumentalities of the United States are for resale;

(9) That plaintiff is a person doing a legally

organized wholesale and jobbing business known to the trade as such and all of said sales were made to retail merchants or jobbers for purposes of resale;

(10) That the requirement that a retail merchant, to whom sales are made by a legally organized wholesale business, must be licensed in order that sales to such a person shall be taxable at the wholesale rate rather than at the retail rate [8] is an unreasonable and arbitrary classification contrary to the provisions of Article I, Section 8, Clauses 12 and 13, and of the Fifth Amendment of the Constitution of the United States in that it discriminates against sales to the United States and its agencies and instrumentalities and subjects to tax, at a higher rate, merchandise sold to federal agencies or instrumentalities for resale than similar goods sold to other persons, and in that it deprives taxpayer of property without due process.

VIII.

That no part of said $10,425.95 has been repaid by defendant to plaintiff, and that the whole amount is now due, owing and unpaid; that this suit is brought pursuant to the provisions of Section 571, Revised Laws of Hawaii 1935, and every other provision of law thereto enabling.

IX.

That plaintiff is justly entitled to recover from defendant, after allowing all just claims and off-

sets, said sum of $10,425.95, together with costs and interest on said sum as by law provided.

Wherefore Plaintiff Prays: That process issue out of this Honorable Court, citing defendant to appear and answer this Complaint, and that plaintiff have judgment against the defendant William Borthwick for the sum of Ten Thousand Four Hundred Twenty-five and 95/100ths Dollars ($10,425.95), together with costs and interests upon said sum.

Dated at Honolulu, T. H., this 17th day of May, 1944.

THOMAS H. BRODHEAD,
d.b.a.
T. H. BRODHEAD CO.,
By SMITH, WILD, BEEBE & CADES,

By /s/ MILTON CADES,
Attorneys for Plaintiff. [9]

Territory of Hawaii,
City and County of Honolulu—ss.

Milton Cades, being first duly sworn, on oath deposes and says: that he is a partner in the firm of Smith, Wild, Beebe & Cades, attorneys for the plaintiff named in the foregoing Complaint; that he has read the same, knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

/s/ MILTON CADES.

Subscribed and sworn to before me this 17th day of May, 1944.

[Notarial Seal]

/s/ FRIEDA H. ROBERT,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires June 30, 1945. [10]

EXHIBIT A

Smith, Wild, Beebe & Cades
Honolulu, T. H.

May 11, 1944

Mr. William Borthwick
Tax Commissioner and Tax Collector
Territorial Tax Building
Honolulu, T. H.

Dear Sir:

Thomas H. Brodhead, the general partner of T. H. Brodhead Co., a registered special partnership, hereinafter called the "taxpayer," hereby

acknowledges receipt of your notices dated May 2, 1944, entitled "First Notice of Proposed Change in Gross Income and/or Consumption Tax Assessment" for the following periods: October 1, 1942, to December 31, 1942; January 1, 1943, to December 31, 1943; and January 1, 1944, to March 31, 1944, in which the total additional gross income and/or consumption taxes to be assessed is $10,425.95. In your notices you purport to increase the gross income taxable on account of retail sales, and the gross income tax payable on account of such sales, by the following amounts:

	Gross Income	Tax
October 1 to December 31, 1942:		
Retail Sales to Post Exchanges	$49,602.24	$ 744.03
Retail Sales to Ship's Service Stores	81,383.69	1,220.76
Other sales to the United States and/or its instrumentalities, departments, or agencies	2,120.40	31.81
January 1 to December 31, 1943:		
Retail Sales to Post Exchanges	$155,266.67	$2,329.00
Retail Sales to Ship's Service Stores	291,044.42	4,365.67
Other Sales to the United States, etc.	440.67	6.61
January 1, to March 31, 1944:		
Retail Sales to Post Exchanges	$33,444.20	$ 501.66
Retail Sales to Ship's Service Stores	81,036.44	1,215.55
Other sales to the United States, etc.	723.99	10.86

You Are Hereby Notifed that the taxpayer disputes and disagrees with said additional assessment and contends that his gross income subject to tax is not in excess of that returned by him. [11]

Taxpayer herewith remits to you the said sum of $10,425.95 demanded by you, and hereby notifies you to hold and keep the said sum of $10,425.95 in

accordance with law pending final determination of the right of the Territory to claim, receive and retain said sum or any portion thereof.

You Are Further Notified that the taxpayer is paying and does pay the said sum under protest on the following grounds:

I.

That the amount of $695,062.72 which you claim as the additional amount taxable at the retail rate of 1½% represents sales to the United States and/or its instrumentalities, departments or agencies.

(a) Such sales are exempt from gross income tax under the provisions of the General Business Excise Tax Act under which the taxes in question are purported to be assessed. (Brodhead v. Borthwick, decided March 31, 1944 (Judge Matthewman, being Law No. 16956 in the Circuit Court of the First Judicial Circuit, Territory of Hawaii.)

(b) The imposition of a gross income tax on such sales by the Territory in any event is in violation of Article I, Section 8, Clauses 12 and 13 of the Constitution of the United States of America, in that said tax is a direct burden on the Federal Government in the exercise of its essential governmental power of raising and supporting armies and of providing and maintaining a Navy. The imposition of said tax by the Territory retards, impedes and burdens the operation of constitutional laws duly enacted by Congress for the purpose of carrying into execution essential governmental powers

vested in the Federal Government, which is in direct violation of the provisions of said Article I, Section 8, Clauses 12 and 13 of the Constitution of the United States of America.

(c) The imposition of said tax is in violation of the Fifth Amendment of the Constitution of the United States in that it deprives the taxpayer of property without due process of law. Said tax purports to be a tax on the privilege of engaging in the business of selling to the United States for essential governmental purposes. As such it constitutes a tax on a privilege which the Territory does not confer. The right of the United States to make purchases is derived from the Constitution and the right to make sales to the United States is not given by the Territory, nor is it dependent upon Territorial laws, but it results from the authority of the national government to choose its own means and sources of supply. For the Territory to lay a tax on transactions by which the United States secures the things which it desires and needs for governmental purposes is a violation of the Fifth Amendment in that it deprives the taxpayer of property without due process. [12]

(4) The imposition of said tax violates Section 55 of the Hawaiian Organic Act of the Territory of Hawaii in that it imposes a direct tax on the privilege of carrying on business with the United States, which is a subject beyond the legislative power of the Legislature of the Territory of Hawaii in that it is not a rightful subject of legislation and

is inconsistent with the Constitution and laws of the United States.

II.

Such sales to Post Exchanges and Ship's Service Stores are made for the purpose of resale by such stores and cannot be taxed at more than ¼ of 1%.

(a) Taxpayer is a person doing a legally organized wholesale and jobbing business known to the trade as such, and all of said sales were made to retail merchants or jobbers for purposes of resale.

(b) The requirement that a retail merchant to whom sales are made by a legally organized wholesale business must be licensed in order that sales to such a person shall be taxable at the wholesale rate rather than at the retail rate is an unreasonable and arbitrary classification contrary to the provisions of Article I, Section 8, Clauses 12 and 13, and the provisions of the Fifth Amendment of the Constitution of the United States in that it discriminates against sales to the United States and its agencies and instrumentalities and subjects to tax, at a higher rate, merchandise sold to federal agencies or instrumentalities for resale than similar goods sold to other persons, and in that it deprives taxpayers of property without due process.

The specific grounds of protest hereinbefore set forth and the objections urged to the assessment of additional tax are made without prejudice to the right of the taxpayer to urge additional objections to said assessment and additional grounds of pro-

test, and the taxpayer reserves unto himself all other matters of objections and exception to any grounds of protest against said additional assessments which may hereafter be presented to any court of competent jurisdiction in any proceeding which may be commenced to recover the money paid under protest or proceedings to adjust the claims for taxes.

Very truly yours,

T. H. BRODHEAD CO.
By /s/ THOS. H. BRODHEAD,
General Partner.

Receipt of the sum of $10,425.95 which is paid under protest, and receipt of the foregoing protest is hereby acknowledged this 15th day of May, 1944.

WILLIAM BORTHWICK,
Tax Commissioner and Tax Collector.

By /s/ T. WESTLY. [13]

[Title of Circuit Court and Cause.]

TERM SUMMONS

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy, or Any Police Officer in the Territory of Hawaii Making Service Hereof:

You Are Commanded to summon the above named Defendant, in case ..... shall file written answer Within Twenty Days After Service Hereof, to be and appear before the First Circuit Court at the Judiciary Building in Honolulu, at the term thereof pending immediately after the expiration of twenty days after service hereof; To Show Cause why the claim of the above named Plaintiff should not be avoided pursuant to the tenor of the annexed complaint.

And have you then there this Writ with full return of your proceedings thereon.

Witness the Honorable Presiding Judge of the Circuit Court of the First Judicial Circuit at Honolulu aforesaid, this 18th day of May, 1944.

[Seal] /s/ F. A. HONG,
Clerk.

SHERIFF'S RETURN

Served the within Summons William Borthwick, Tax Commissioner and Tax Collector, at Honolulu this 18th day of May, 1944, by delivering to him a certified copy hereof and of the complaint hereto

annexed and at the same time showing him the original.

Dated May 18, 1944.

/s/ SAM K. PAULO, SR.,
Deputy Sheriff, City and
County of Honolulu. [14]

General Order No. 133, Section 2, Paragraph 4

4. (a) No judgment by default shall be entered against any person who is in the Army, Navy, Marine Corps, or Coast Guard of the United States. No judgment by default shall be entered against any person employed or engaged in any occupation, business, or activity under the supervision or direction of the Military Governor, or otherwise essential to the national defense, until seven (7) days shall have elapsed after the return day provided in the summons or by the statutes of the Territory of Hawaii. A default judgment hereafter entered shall be set aside upon the mere request of the defendant or his attorney, made either orally or in writing, to the court, or clerk thereof, in which the case was pending at the time of the entry of such judgment, if such request be so made within fifteen days after entry of such default judgment. Leave to appear or answer shall be allowed or extended for a like period of fifteen days after such default shall have been set aside. In the event the defendant, after having been allowed to so appear or answer as aforesaid, shall fail to so appear or answer as aforesaid within said period of fifteen days, the

court may again enter or cause to be entered the default of the defendant and enter or order entered judgment by default against such defendant. A defendant shall have no right upon his mere request to have a default judgment set aside a second time in the same case.

(b) The provisions contained in this paragraph shall apply to pending cases as well as to cases hereafter commenced or instituted.

(c) A verbatim copy of the contents of this paragraph shall be attached to the summons and served upon the defendant or defendants in cases hereinafter commenced or instituted.

[Amending General Order No. 29]

[Endorsed]: Filed May 18, 1944. [14a]

[Title of Circuit Court and Cause.]

ANSWER

Comes now William Borthwick, Tax Commissioner of the Territory of Hawaii, defendant above named, by Rhoda V. Lewis, Assistant Attorney General of the Territory of Hawaii, answering the plaintiff's complaint heretofore filed in the above cause says:

I.

That he admits the allegations contained in paragraph II of said complaint.

II.

That except for the allegations contained in paragraph II, defendant denies all of the material allegations contained in plaintiff's complaint. [16]

Wherefore, defendant prays that plaintiff take nothing by his action.

Dated at Honolulu, T. H., this 25th day of May, 1944.

WILLIAM BORTHWICK,
Tax Commissioner of the Territory of Hawaii, Defendant.

By /s/ RHODA V. LEWIS,
Assistant Attorney General of the Territory of Hawaii.

[Endorsed]: Filed May 25, 1944. [17]

[Title of Circuit Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between Thomas H. Brodhead, doing business as T. H. Brodhead Co., plaintiff above-named, and William Borthwick, Tax Commissioner of the Territory of Hawaii, defendant above-named, by their respective counsel that:

I.

Plaintiff is and at all times hereinafter mentioned was a resident of Honolulu, City and County

of Honolulu, Territory of Hawaii; plaintiff is the general partner of a registered special partnership doing business in Honolulu aforesaid under the firm name and style of T. H. Brodhead Co.

II.

Defendant is and was at all relevant times the duly appointed, qualified and acting Tax Commissioner of [19] the Territory of Hawaii, and as such is and was at all relevant times in charge of the administration and enforcement of Act 141 (Ser. A-44) of the Session Laws of Hawaii, 1935, as amended from time to time (hereafter referred to as the General Excise Tax Law), and with respect to any money representing a claim of the Territory for taxes pursuant to said General Excise Tax Law (hereafter referred to as gross income taxes) was a public accountant of the Territory within the meaning of Section 571 of the Revised Laws of Hawaii, 1935.

III.

Plaintiff made monthly gross income tax returns for each of the months of October, 1942, to March, 1944, inclusive, and annual returns of gross income tax for each of the years 1942 and 1943, at the times required by law; plaintiff duly paid the gross income tax on the amounts of gross income reported in said returns as taxable, as and when the same was due and payable.

On April 26, 1944, plaintiff, with the permission of the Tax Commissioner, filed amended returns covering the periods of October 1 to December 31,

1942, January 1 to December 31, 1943, and January, February and March, 1944.

On May 2, 1944, the Tax Commissioner issued first notices of proposed additional assessments of gross income taxes for the aforesaid periods, increasing the gross income taxable and the tax thereon, as follows: [20]

October 1 to December 31, 1942

Business Activity	Additional Amt. Taxable	Rate	Additional Tax	
Retail Sales Post Exchanges	$ 49,602.24	1½%	$ 744.03	
Retail Sales Ships' Service Stores	81,383.69	1½%	1,220.76	
Retail Sales Other Federal Sales	2,120.40	1½%	31.81	
				$1,996.60

January 1 to December 31, 1943

Retail Sales Post Exchanges	$155,266.67	1½%	$2,329.00	
Retail Sales Ships' Service Stores	291,044.42	1½%	4,365.67	
Retail Sales Other Federal Sales	440.67	1½%	6.61	
				$6,701.28

January 1 to March 31, 1944

Retail Sales Post Exchanges	$ 33,444.20	1½%	$ 501.66	
Retail Sales Ships' Service Stores	81,036.44	1½%	1,215.55	
Retail Sales Other Federal Sales	723.99	1½%	10.86	
				1,728.07
Total Tax				$10,425.95

The aforesaid sales were reported by plaintiff but the income therefrom was claimed to be exempt as derived from sales to the United States government and its post exchanges and ships' service stores; moreover, plaintiff classified the sales to the post exchanges and ships' service stores as "wholesaling." The Tax Commissioner disallowed the claimed exemption and disallowed the wholesale [21] classification of sales to post exchanges and ships' service stores, reclassifying the same as retail sales.

On May 15, 1944, the plaintiff waived the necessity of a thirty-day interval between the first and second notices of assessment, without prejudice to his claims, and the proposed additional assessments were made. On the same day, May 15, 1944, plaintiff paid under protest the sum of $10,425.95 so assessed, a true copy of plaintiff's protest being annexed to the complaint as Exhibit "A," it being stipulated that the copy so annexed to the complaint shall have the same effect as if admitted in evidence.

IV.

Plaintiff made the sales to the United States government and its post exchanges and ships' service stores in the respective amounts and for the periods above set forth, and no gross income tax has been paid with respect thereto except the tax so paid under protest. The following is a summary of the figures set forth in paragraph III of this stipulation, the below summary further showing the 1943 sales divided between the period January 1 to April 30, 1943, and May 1 to December 31, 1943.

Item No.	Amount of Gross Income and Period	Source*	Rate of Tax Assessed, and Amount of Tax Paid Under Protest	How Returned by Plaintiff
1.	$130,985.93 Oct.-Dec., '42	PX sales	1½% $1,964.79	Wholesaling; exemption claimed.
2.	$ 2,120.40 Oct.-Dec., '42	Sales to U.S.	1½% $ 31.81	Retailing; exemption claimed.
3.	$115,106.05 Jan.-April, '43	PX sales	1½% $1,726.59	Wholesaling; exemption claimed.
4.	$ 169.92 Jan.-April, '43	Sales to U.S.	1½% $ 2.55	Retailing; exemption claimed.
5.	$331,205.04 May-Dec., '43	PX sales	1½% $4,968.08	Wholesaling; exemption claimed.
6.	$ 270.75 May-Dec., '43	Sales to U.S.	1½% $ 4.06	Retailing; exemption claimed.
7.	$114,480.64 Jan.-Mar., '44	PX sales	1½% $1,717.21	Wholesaling; exemption claimed.
8.	$ 723.99 Jan.-Mar., '44	Sales to U.S.	1½% $ 10.86	Retailing; exemption claimed.

*PX refers to sales to post exchanges and ships' service stores.

V.

Annexed hereto as Exhibits "B" and "C," with the same effect as if admitted in evidence, are copies of plaintiffs' amended returns for October 1 to December 31, 1942, January 1 to December 31, 1943, and January, February and March, 1944 (Exhibit "B"); and copies of the additional assessments made by the Tax Commissioner covering the aforesaid periods (Exhibit "C").

VI.

The post exchanges to which reference is made in this stipulation are operated under army regulations, a copy of such regulations as revised March 19, 1943, being hereto annexed as Exhibit "D" with the same effect as if admitted in evidence; it is hereby stipulated that the Army regulations in effect during the period involved in this case were the same in all material respects as said Exhibit "D."

Such post exchanges do not differ materially from the post exchanges involved in Standard Oil Co. v. [23] Johnson, 316 U. S. 481, 86 L. Ed. 1611, June 1, 1942. At no time did any of said post exchanges have a license under the General Excise Tax Law of the Territory, Act 141 (Ser. A-44) of the Session Laws of Hawaii, 1935, as amended, and at no time did any of said post exchanges pay any tax under said law.

Purchases are made by post exchanges both on the mainland and locally, according to the best judgment of the exchange officer, the delivered cost to the exchange being one of the most important factors considered.

Goods purchased from the plaintiff were purchased for sale by the exchange to authorized persons and organizations in accordance with paragraph 13 of the Regulations, which are Exhibit "D," and such authorized persons and organizations bought such goods from the exchange for their own use or consumption and not for further sale.

The post exchanges operate stores, as authorized

by paragraph 10 of the Regulations, Exhibit "D," and with the exception of goods sold to authorized organizations the goods bought from the plaintiff were sold in such stores in small quantities to each purchaser.

VII.

The ships' service stores, to which reference is made in this stipulation, have the same relation to the United States Navy as the post exchanges have to the United States Army and there is no material difference in the facts with respect to such ships' service stores.

VIII.

All of the evidence received upon the trial of L. No. 16956 on June 16, 1943, is hereby stipulated to be [24] equally applicable to this case, and the same shall be considered with the same effect as if received in this case.

IX.

This stipulation is not intended to be and is not a complete stipulation of facts, and each party reserves the right to produce evidence upon the trial of this cause; neither party by joining in this stipulation admits the materiality of the facts set forth herein, each reserving the right to argue that certain of such facts are immaterial to the disposition of this cause.

Dated at Honolulu, T. H., this 24th day of June, 1944.

THOMAS H. BRODHEAD, d.b.a
T. H. BRODHEAD CO.,
Plaintiff.

By SMITH, WILD, BEEBE &
CADES.

By /s/ MILTON CADES,
His Attorneys.

WILLIAM BORTHWICK,
Tax Commissioner,
Defendant.

By /s/ RHODA V. LEWIS,
Assistant Attorney General,
His Attorney.

Approved July 6, 1944.

/s/ JOHN ALBERT
MATTHEWMAN,
Judge. [25]

EXH. IT "3"

TERRITORY OF HAWAII — FIRST TAXATION DIVISION

Combined Gross Income and Consumption Tax Return

1942

AMENDED

AMENDED

Thos. H. Brodhead-General Partner & Bishop Trust Co., Trustee, Special Partner d.b.a. T. H. Brodhead Co. P. O. Box 675, and/or 843 Kaahumanu St.

No. 1- 591

(Form H-1-041) **GROSS INCOME TAX—ACT 141 S. L. 1935.** MONTH OF October to December 1942

BUSINESS ACTIVITY	AMOUNT OF GROSS INCOME	EXEMPT INCOME	DEDUCTIONS	AMOUNT TAXABLE	RATE %	AMOUNT OF TAX
1. RETAILING	$ 28,769.17	$ 10.80 27,637.08	$	$ 1,121.29	1½	$ 16.82
2. SUGAR PROCESSING AND CANNING					1½	
3. PRODUCING					¼	
4. WHOLESALING	239,567.53	218,497.57		21,069.96	¼	52.67
5. CERTAIN MANUFACTURING					¼	
6. PRINTING AND PUBLISHING ONLY					1½	
7. SERVICES OTHER THAN STRICTLY PROFESSIONAL					1½	
8. PROFESSIONAL SERVICES					1½	
9. CONTRACTING					1½	
10. THEATRES, AMUSEMENTS AND RADIO BROADCASTING					1½	
11. INTEREST AND DISCOUNTS					1½	
12. COMMISSIONS	10,055.81			10,055.81	1½	150.84
13. RENTALS					1½	
14. ALL OTHER INCOME					1½	

14A. TOTAL GROSS INCOME TAXES $ 220.33

Sup. Ct. Misc. No. 268 1946 Clerk U. S. Supreme Court

CONSUMPTION TAX-ACT 160. S.L. 1935.

PROPERTY PURCHASED FOR USE OR CONSUMPTION	EXEMPTIONS	MONTHLY DEDUCTION	AMOUNT TAXABLE		
15. VALUE $	$	$ 100.00	$	1½	$

IMPORTANT: To be allowable, "Exempt Income" and "Deductions" claimed must be fully explained on the reverse side of this return.

15A. TOTAL GROSS INCOME AND CONSUMPTION TAXES $

16. DEDUCT "OVERPAYMENT"—If you have overpaid taxes and have received an OVERPAYMENT NOTICE accordingly, please deduct here and attach said notice to this return. $

DATE April 26th, 1944

SIGNED T. H. Brodhead

16A. TOTAL AMOUNT DUE AND PAYABLE $ 220.33

EXEMPT INCOME

Sales to United States Government:	
Mainland Delivery	$ 25,516.68
Local Delivery	2,120.40
	$ 27,637.08
Sales to Post Exchanges:	
Mainland Delivery	$ 15,177.20
Local Delivery	49,602.24
Sales to Ship Service Stores:	
Mainland Delivery	$ 72,334.44
Local Delivery	81,383.69
	$218,497.57
Sales in Interstate Commerce	$ 10.80

GROSS INCOME TAX AMENDED

ANNUAL AMENDED

FIRST TAXATION DIVISION

DIVISION
TERRITORY OF HAWAII

Combined Gross Income and Consumption Tax Return
FOR PERIOD ENDING DECEMBER 31, 1943

LICENSE NUMBER 00591

T.H.BRODHEAD,BISHOP TRUST CO.,LTD., TR. | T. H. Brodhead Company
Name or Names of Owners Here | Firm Name Here

843 Kaahumanu St., Honolulu -16- | Box 675, Honolulu -9
Street Address | Post Office

Kind of Business Trade or Occupation: Wholesale - Commission Merchant

Check whether your books are kept on the CASH ( ) or ACCRUAL ( ) basis.

Individual ☐ Partnership ☒ Corporation ☐ Others ☐

GROSS INCOME TAX-ACT 141 S. L. 1935

→ (TAX OFFICE COPY)

BUSINESS ACTIVITY	(A) AMOUNT OF GROSS INCOME	(B) EXEMPT INCOME	(C) DEDUCTIONS	(D) AMOUNT TAXABLE	RATE %	(E) AMOUNT OF TAX
1. RETAILING	$ 3,340.18	$ 18.00 691.23	$	$ 2,630.95	1½	$ 39.46
2. SUGAR PROCESSING AND CANNING					1½	
3. PRODUCING					¼	
4. WHOLESALING	695,957.71	613,462.21	755.83	81,739.67	¼	204.35
5. CERTAIN MANUFACTURING					¼	
6. PRINTING AND PUBLISHING ONLY					1½	
7. SERVICES OTHER THAN STRICTLY PROFESSIONAL		COPY			1½	
8. PROFESSIONAL SERVICES					1½	
9. CONTRACTING					1½	
10. THEATRES, AMUSEMENTS AND RADIO BROADCASTING					1½	
11. INTEREST AND DISCOUNTS					1½	
12. COMMISSIONS	32,124.44			32,124.44	1½	481.87
13. RENTALS					1½	
14. ALL OTHER INCOME					1½	
TOTALS						$ 725.68

CONSUMPTION TAX-ACT 160. S. L. 1935.

PROPERTY PURCHASED FOR USE OR CONSUMPTION	EXEMPTIONS	MONTHLY DEDUCTION	AMOUNT TAXABLE	RATE	
15. VALUE $	$	$	$	1½	$

RECONCILIATION

15A. TOTAL GROSS INCOME AND CONSUMPTION TAXES		$ 725.68
16. TOTAL GROSS INCOME TAXES PAID FOR THE PERIOD	$ 725.68	
17. TOTAL CONSUMPTION TAXES PAID FOR THE PERIOD	$	
18. ADDITIONAL ASSESSMENTS PAID FOR THE PERIOD	$	
19. AMOUNT OF TAXES AND ASSESSMENTS PAID FOR THE PERIOD		$ 725.68

AFFIDAVIT

AMOUNT OF TAXES NOW DUE AND PAYABLE AND/OR OVERPAID $

I (we) do swear or affirm to the best of my (our) knowledge and belief that this return and the schedules on the reverse side hereof and any supplemental schedules attached hereto constitute a true and complete return made in good faith for the period January 1, 1943 to December 31st, 1943 pursuant to the provisions of the General Excise Tax Law, Section 6, Act 141, Session Laws of Hawaii 1935.

Sworn to and subscribed before me this 26 day of April 1944.

dated

Signature of Officer Administering Oath

Title

/s/ Thomas H. Brodhead
Taxpayer's or Agent's signature

General Partner
Title

IN CASE OF A CORPORATION OR PARTNERSHIP, THIS RETURN MUST BE SIGNED BY AN OFFICIAL OR PARTNER.

(FORM H-960-01) ©

GROSS INCOME TAX: ACT 141 S. L. 1935

DO NOT USE THIS SPACE		
	Date	Name
Ofc. Aud.		
Net Inc.		
Field Aud.		

SCHEDULE "B"=EXEMPT INCOME:

Sales in Interstate and/or Foreign Commerce (Seattle, Wash.)			$ 18.00
Interest received by Bldg. & Loan Associations from loans to its members			
	Mainland Delivery	Local Delivery	
Sales to U. S. Government:	250.56	440.67	691.23
Sales to Post Exchanges:	12,193.69	155,266.67	167,460.36
Sales to Ship Service Stores:	154,957.43	291,044.42	446,001.85
TOTAL EXEMPT INCOME			$ 614,171.44

SCHEDULE "C"=DEDUCTIONS:

Merchandise returned	$
Bad Debts charged off for Income Tax purposes if reporting on accrual basis - - upon sales made on and after July 1, 1935 only (Attach schedule showing date incomes were reported on which taxes were paid)	
Cash Discounts allowed and taken on sales	755.83
Refunds to borrowers	
Territorial Gasoline Tax (at 5½¢ per gallon on gasoline sold)	
Amounts paid to Sub-Contractors (Please attach list showing name, address, license number, type of work performed and amount paid to each sub-contractor)	
Discounts earned on Merchandise purchased, if your books show such as income	
Transportation Charges: (On Manufactured products shipped out of the Territory) (When shown as a separate item on the invoice and reimbursed by the purchaser of the merchandise)	
Inter-Departmental Transfers	
Trade-in Allowances:	
All Other Deductions:	
TOTAL DEDUCTIONS	$ 755.83

CONSUMPTION TAX ACT 160 S. L. 1935

EXEMPTIONS: Purchases of Tangible Personal Property (not for use or consumption)	
DEDUCTIONS: Allowable deduction of $100. for each month in which a Tax was paid.	

INSTRUCTIONS

THE BLUE COPY OF THIS RETURN SHALL BE TRANSMITTED TO THE TERRITORIAL TAX OFFICE, GROSS INCOME TAX DIVISION AND THE BUFF COPY SHALL BE RETAINED BY YOU.

EXEMPTIONS AND DEDUCTIONS

To be allowable, all Exemptions and Deductions must be fully explained. We therefore ask that you break down all the EXEMPT INCOME and DEDUCTIONS which you claim in your return, and show in detail in the spaces provided above, why you are claiming such as EXEMPT INCOME or as DEDUCTIONS.

FILING OF RETURN

This report is for the period beginning January 1, 1943 to December 31, 1943, both inclusive, and shall be filed on or before March 20th 1944, if you report on a Calendar year basis. If you report on a FISCAL year basis then your ANNUAL RETURN shall be filed on or before sixty days after the time required for filing such return on a FISCAL basis.

CHANGE OF NAME OR ADDRESS

IF THE NAME OF YOUR BUSINESS HAS BEEN CHANGED DURING THE YEAR, OR YOU HAVE MOVED TO A NEW LOCATION, OR BOTH, PLEASE BE GOOD ENOUGH TO NOTIFY US SO THAT WE MAY CORRECT OUR RECORDS ACCORDINGLY.

FOR USE DURING THE YEAR Amended **1944** ONLY

TERRITORY OF HAWAII
Combined Gross Income and Consumption Tax Return

FIRST TAXATION DIVISION

T. H. Brodhead Co.
PRINT NAME AND ADDRESS EXACTLY AS SHOWN ON LICENSE

No.

843 Kaahumanu St. (STREET ADDRESS) Box 675 (POST OFFICE)

GROSS INCOME TAX—Act 141 S. L. 1935 MONTH OF January 194

BUSINESS ACTIVITY	AMOUNT OF GROSS INCOME	EXEMPT INCOME	DEDUCTIONS	AMOUNT TAXABLE	RATE %	AMOUNT OF TAX
1. RETAILING	$ 95.94	$	$	$ 95.94	1½	$ 1.44
2. SUGAR PROCESSING AND CANNING					1½	
3. PRODUCING					¼	
4. WHOLESALING	65,076.52	56,519.55		8,556.97	¼	21.39
5. CERTAIN MANUFACTURING					¼	
6. PRINTING AND PUBLISHING ONLY					1½	
7. SERVICES OTHER THAN STRICTLY PROFESSIONAL					1½	
8. PROFESSIONAL SERVICES					1½	
9. CONTRACTING					1½	
10. THEATRES, AMUSEMENTS AND RADIO BROADCASTING					1½	
11. INTEREST AND DISCOUNTS					1½	
12. COMMISSIONS	1,636.58			1,636.58	1½	24.55
13. RENTALS					1½	
14. ALL OTHER INCOME					1½	

14A. TOTAL GROSS INCOME TAXES $ 47.38

FILED May 29 1944 8 o'clock A. M. COPY

CONSUMPTION TAX-ACT 160. S. L. 1935.

PROPERTY PURCHASED FOR USE OR CONSUMPTION	EXEMPTIONS	MONTHLY DEDUCTION	AMOUNT TAXABLE		
15. VALUE $	$	$ 100.00	$	1½	$

IMPORTANT: To be allowable, "Exempt Income" and "Deductions" claimed must be fully explained on the reverse side of this return.

15A. TOTAL GROSS INCOME AND CONSUMPTION TAXES $

16. DEDUCT "OVERPAYMENT" — If you have overpaid taxes and have received an OVERPAYMENT NOTICE accordingly, please deduct here and attach said notice to this return. $

DATE April 26, 1944

SIGNED T. H. Brodhead

16A. TOTAL AMOUNT DUE AND PAYABLE $

(FORM N-5-61) ©

EXEMPT INCOME

Sales to Post Exchanges:	
Mainland Delivery	.00
Local Delivery	$16,113.66
Sales to Ship Service Stores:	
Mainland Delivery	$ 9,158.52
Local Delivery	31,247.37
	$56,519.55

FOR USE DURING THE YEAR AMENDED **1944** ONLY

TERRITORY OF HAWAII
Combined Gross Income and Consumption Tax Return

FIRST TAXATION DIVISION

T. H. Brodhead Co. No.
PRINT NAME AND ADDRESS EXACTLY AS SHOWN ON LICENSE

843 Kaahumanu St. Box 675
STREET ADDRESS POST OFFICE

GROSS INCOME TAX—Act 141 S. L. 1935 MONTH OF February 1944

BUSINESS ACTIVITY	AMOUNT OF GROSS INCOME	EXEMPT INCOME	DEDUCTIONS	AMOUNT TAXABLE	RATE %	AMOUNT OF TAX
1. RETAILING	$ 479.32	$	$	$ 479.32	1½	$ 7.19
2. SUGAR PROCESSING AND CANNING					1½	
3. PRODUCING					¼	
4. WHOLESALING	46,657.30	41,777.21		4,880.09	¼	12.20
5. CERTAIN MANUFACTURING					¼	
6. PRINTING AND PUBLISHING ONLY					1½	
7. SERVICES OTHER THAN STRICTLY PROFESSIONAL					1½	
8. PROFESSIONAL SERVICES					1½	
9. CONTRACTING					1½	
10. THEATRES, AMUSEMENTS AND RADIO BROADCASTING					1½	
11. INTEREST AND DISCOUNTS					1½	
12. COMMISSIONS	5,645.90			5,645.90	1½	84.69
13. RENTALS					1½	
14. ALL OTHER INCOME					1½	

Supt. # Filed Oct 20 1944
Allen O'Brien A. M.
Clerk Supreme Court

14A. TOTAL GROSS INCOME TAXES $ 104.08

CONSUMPTION TAX-ACT 160. S. L. 1935.

PROPERTY PURCHASED FOR USE OR CONSUMPTION	EXEMPTIONS	MONTHLY DEDUCTION	AMOUNT TAXABLE		
15. VALUE $	$	$ 100.00	$	1½	$

IMPORTANT: To be allowable, "Exempt Income" and "Deductions" claimed must be fully explained on the reverse side of this return.

15A. TOTAL GROSS INCOME AND CONSUMPTION TAXES $

16. DEDUCT "OVERPAYMENT" — If you have overpaid taxes and have received an OVERPAYMENT NOTICE accordingly, please deduct here and attach said notice to this return. $

DATE April 26, 1944

SIGNED T. H. Brodhead

16A. TOTAL AMOUNT DUE AND PAYABLE $

(FORM H-3-G1) ®

EXEMPT INCOME

Sales to Post Exchanges:		
	Mainland Delivery	.00
	Local Delivery	$13,215.60
Sales to Ship Service Stores:		
	Mainland Delivery	5,113.67
	Local Delivery	23,447.94
		$41,777.21

FOR USE DURING THE YEAR 1944 ONLY

AMENDED

TERRITORY OF HAWAII

Combined Gross Income and Consumption Tax Return

FIRST TAXATION DIVISION

T. H. Brodhead Co.

PRINT NAME AND ADDRESS EXACTLY AS SHOWN ON LICENSE

No.

843 Kaahumanu St., Box 675

STREET ADDRESS POST OFFICE

GROSS INCOME TAX—Act 141 S. L. 1935

MONTH OF March 1944

BUSINESS ACTIVITY	AMOUNT OF GROSS INCOME	EXEMPT INCOME	DEDUCTIONS	AMOUNT TAXABLE	RATE %	AMOUNT OF TAX
1. RETAILING	$ 968.91	$ 867.99	$	$ 100.92	1½	$ 1.51
2. SUGAR PROCESSING AND CANNING					1½	
3. PRODUCING					¼	
4. WHOLESALING	51,562.07	48,456.10		3,105.97	¼	7.76
5. CERTAIN MANUFACTURING					¼	
6. PRINTING AND PUBLISHING ONLY					1½	
7. SERVICES OTHER THAN STRICTLY PROFESSIONAL					1½	
8. PROFESSIONAL SERVICES					1½	
9. CONTRACTING					1½	
10. THEATRES, AMUSEMENTS AND RADIO BROADCASTING					1½	
11. INTEREST AND DISCOUNTS					1½	
12. COMMISSIONS	6,637.00			6,637.00	1½	99.56
13. RENTALS					1½	
14. ALL OTHER INCOME					1½	

14A. TOTAL GROSS INCOME TAXES $ 108.83

CONSUMPTION TAX-ACT 160. S. L. 1935.

PROPERTY PURCHASED FOR USE OR CONSUMPTION	EXEMPTIONS	MONTHLY DEDUCTION	AMOUNT TAXABLE		
15. VALUE $	$	$ 100.00	$	1½	$

IMPORTANT: To be allowable, "Exempt Income" and "Deductions" claimed must be fully explained on the reverse side of this return.

15A. TOTAL GROSS INCOME AND CONSUMPTION TAXES $

16. DEDUCT "OVERPAYMENT" — If you have overpaid taxes and have received an OVERPAYMENT NOTICE accordingly, please deduct here and attach said notice to this return. $

DATE April 26th, 1944

SIGNED T. H. Brodhead

16A. TOTAL AMOUNT DUE AND PAYABLE $

FORM H-S-G11 ©

EXEMPT INCOME

Sales to U. S. Government:	
Mainland Delivery	$ 144.00
Local Delivery	723.99
Total	$ 867.99
Sales to Post Exchanges:	
Mainland Delivery	% .00
Local Delivery	4,114.94
Sales to Ship Service Stores:	
Mainland Delivery	18,000.03
Local Delivery	26,341.13
Total	$48,456.10

(Endorsed): Filed Nov. 20, 1946.

EXHIBIT "C"

Territory of Hawaii

Office of the Tax Assessor — TAX COMMISSIONER

irst Taxation Division

MAY 2 1944 194__
(Date of First Notice)

ASSESSORS' COPY OF NOTICE OF ADDITIONAL GROSS INCOME AND/OR CONSUMPTION TAX ASSESSMENT

For the period beginning October 1st 19 42

And ending December 31st 19 42

TO: T. H. Brodhead Company
843 Kashumanu Street
Honolulu -16- Hawaii

COPY

LICENSE NUMBER: 591

ASSESSED: May 15, 1944

Business Activity	As Returned	As Changed	Additional Amount Taxable	Rate	Additional Tax
Retail Sales Post Exchanges			49,602 24	1-1/2	744 03
" " Ship's Service Stores			81,383 69	1-1/2	1,220 76
" " Other Federal Sales			2,120 40	1-1/2	31 81

TAL ADDITIONAL GROSS INCOME TAX TO BE ASSESSED $ 1,996.6

CONSUMPTION TAX

Additional values of property bought for use or consumption	Exemptions	Monthly Deduction	Additional Amount Taxable	Rate	Additi nal Tax

TAL ADDITIONAL CONSUMPTION TAX TO BE ASSESSED

DITIONAL GROSS INCOME AND/OR CONSUMPTION TAXES TO BE ASSESSED $ 1,996.60

Explanation of proposed Changes.

Disallowance of exemption claimed on sales to the Federal Government and its agencies exclusive of merchandise delivered and accepted on the Mainland.

Disallowed wholesale classification of sales to Ship's service stores and Post Exchanges.

Sup. Ct. # 231 Filed Mar. 21 1946 Clerk Supreme Court U.S.

AUDITED BY:
J. I. Nishikawa

W. BORTHWICK Tax Commissioner
By: /s/ T. Westly

Territory of Hawaii

Office of the Tax Assessor — TAX COMMISSIONER

First Taxation Division

MAY 2 1944 194__
Date of First Notice)

ASSESSORS' COPY OF NOTICE OF ADDITIONAL GROSS INCOME AND/OR CONSUMPTION TAX ASSESSMENT

For the period beginning January 1st 19 43

And ending December 31st 19 43

TO: T. H. Brodhead Company

843 Kaahumanu Street — COPY — LICENSE NUMBER: 591

Honolulu -16- Hawaii

ASSESSED: May 15, 1944

Business Activity	As Returned	As Changed	Additional Amount Taxable	Rate	Additional Tax
Retail Sales Post Exchanges			155,266 67	1-1/2	2,329 00
" " Ship's Service Stores			291,044 42	1-1/2	4,365 67
" " Other Federal Sales			440 67	1-1/2	6 61

AL ADDITIONAL GROSS INCOME TAX TO BE ASSESSED $ 6,701.28

CONSUMPTION TAX

Additional values of property bought for use or consumption	Exemptions	Monthly Deduction	Additional Amount Taxable	Rate	Additional Tax

AL ADDITIONAL CONSUMPTION TAX TO BE ASSESSED $

TIONAL GROSS INCOME AND/OR CONSUMPTION TAXES TO BE ASSESSED $ 6,701.28

Explanation of proposed Changes:

Disallowance of exemption claimed on sales to the Federal Government and its agencies exclusive of merchandise delivered and accepted on the Mainland.

Disallowed wholesale classification of sales to ship's service stores and Post Exchanges.

AUDITED BY: J.I.Nishikawa

W BORTHWICK Tax Commissioner

By: /s/ T. Westly

Territory of Hawaii

Office of the Tax Assessor — TAX COMMISSIONER — MAY 2, 1944 194__

First Taxation Division — Date of First Notice)

ASSESSORS' COPY OF NOTICE OF ADDITIONAL GROSS INCOME AND/OR CONSUMPTION TAX ASSESSMENT

For the period beginning January 1st 19 44

And ending March 31st 19 44

TO: T. H. Brodhead Company

843 Kaahumanu Street

Honolulu -16- Hawaii

LICENSE NUMBER: 591

ASSESSED: May 15, 1944

No.	Business Activity	As Returned	As Changed	Additional Amount Taxable	Rate	Addition Tax
1	Retail Sales Post Exchanges			33,444 20	1-1/2	501 6
	" " Ship's Service Stores			81,036 44	1-1/2	1,215 5
	" " Other Federal Sales			723 99	1-1/2	10.8

TOTAL ADDITIONAL GROSS INCOME TAX TO BE ASSESSED $ 1,728.6

CONSUMPTION TAX

Additional values of property bought for use or consumption	Exemptions	Monthly Deduction	Additional Amount Taxable	Rate	Addition Tax

TOTAL ADDITIONAL CONSUMPTION TAX TO BE ASSESSED $

ADDITIONAL GROSS INCOME AND/OR CONSUMPTION TAXES TO BE ASSESSED $ 1,728.6

Explanation of proposed Changes:

Disallowance of exemption claimed on sales to the Federal Government and its agencies exclusive of merchandise delivered and accepted on the Mainland.

Disallowed wholesale classification of sales to ship's service stores and Post Exchanges.

FILED Nov. 20, 19[illegible] Sup. Ct.

At 11:12 o'clock A. M.

Ruth U. Krone

Clerk Supreme Court 763/

AUDITED BY: J. I. Nishikawa

W BORTHWICK, Tax Commissioner

By: /s/ T. Westly

S U M M A R Y

	Post Exchanges	Ship's Service Stores	Other Federal Sales
January	16,113.66	31,247.37	------
February	13,215.60	23,447.94	------
March	4,114.94	26,341.13	723.99
Total	33,444.20	81,036.44	723.99

EXHIBIT D

Army Regulations War Department

No. 210-65* Washington, March 19, 1943

POSTS, CAMPS AND STATIONS

Army Exchanges

Section I

General

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*This pamphlet, together with Manual of Uniform System of Accounts, Forms and Accounting Procedure for Post, Camp, Station, and Field Exchange, supersedes AR 210-65 (Tentative), July 1, 1941, including C 1, August 22, 1942, C 2, October 12, 1942, C 3, December 30, 1942, and C 4, January 16, 1943; sections I, II, III and IV, Circular No. 124, War Department, 1941; section I, Circular No. 143, section IV, Circular No. 198, and paragraphs 1 to 3, inclusive, section VI, Circular No. 356, War Department, 1942.

1. Applicability of regulations. These regulations will govern the operation of all exchanges established within the Army.

2. Definitions. a. An Army exchange is a military organization established as a part of the Army which supplies merchandise and services to specified persons and organizations.

b. An Army exchange is composed of such departments and maintains such activities and facilities as may be authorized.

c. As used in these regulations, the designation, commanding general of service command, will also include commanding generals of departments, theaters of operations, independent task forces, and any other commands the exchange service of which has been exempted by the War Department from the jurisdiction of the commanding general of the service command.

3. Purposes. Exchanges are established for the following purposes:

a. To supply the persons to whom sales are authorized (par. 13) at the lowest possible prices with articles of necessity and convenience not supplied by the Government except as provided in paragraph 10b(5).

b. To make available from profits funds which may be used to afford to military personnel additional facilities for comfort, recreation, and amusement, and to contribute to activities which will foster and increase the physical and spiritual welfare of military personnel.

4. Establishment. a. The commanding general of the service command will have general supervision over the establishment of exchanges. Army Exchange Service will be notified of the establishment of any exchange.

b. Whenever conditions make it desirable and practicable, the commanding officer of a post, camp, station, or installation will establish and maintain an exchange, to include such number of branches, departments, and subordinate activities thereof as may be necessary to serve the military personnel. The establishment of an exchange is authorized only at posts, camps, stations, or installations where enlisted personnel are on duty.

c. Except when the facilities of the home station exchange established under the provisions of b above are available, the commanding officer of troops in the field may authorize the establishment of exchanges when conditions make it desirable and practicable so to do. Where conditions render it necessary or desirable to establish an exchange at a location not included within any military reservation, the commanding officer of the organization desiring such an exchange will obtain prior approval of the commanding general of the service command.

d. A commanding general of a service command

may, where advisable and with consent of the Chief of Army Exchange Service, combine two or more independent exchanges serving separate posts, camps, stations, or installations and operate such combination as an exchange.

e. Except when governed by the provisions of b, c or d above and when no other exchange facilities are available, company or detachment exchanges may be established. In such cases they will conform as far as practicable, as determined by the commanding general of the service command, to these regulations.

f. The establishment of exchanges by or for troops traveling on water carriers is prohibited.

g. In any post, camp, station or installation but one exchange will be established. See paragraph 10.

h. Except for the operations of post restaurants as provided in AR 210-100, the establishment or operation as a civilian installation of any of the activities which an exchange is authorized to operate under the provisions of paragraph 10 is prohibited.

5. Designation. The designation of an exchange will identify it with the command it serves and all of its business will be transacted in the name of the exchange only. Examples:

Fort Snelling Exchange, or
17th AA Battery Exchange, or
501-1 Exchange.
By.....
Captain, AUS, Exchange Officer.

6. Capital for establishment. When the establishment of an exchange has been decided upon, the

commanding officer of the post, camp, station or installation will determine the amount of capital required. For loans see paragraph 35.

7. Liquidations. a. The commanding general of the service command will have general supervision over the liquidation of exchanges. Army Exchange Service will be notified of the liquidation of any exchange.

b. Complete liquidations.

(1) When a post, camp, station, or installation ceases to function as a Federal military activity all of the exchange assets will be liquidated and all of the ascertainable liabilities will be paid in full. Before the fixed assets are disposed of, the Army Exchange Service will be informed in detail of the amount and terms of the bids received for such assets and of the cost, length of service, and condition of each item. The Army Exchange Service, if it so desires, may become the preferred bidder for all or any part of the assets.

(2) The residue (proceeds after all liabilities are paid in full) will be remitted to the Army Exchange Service, to be disposed of as may hereafter be prescribed by the War Department upon recommendation of the Chief of Army Exchange Service.

(3) The records of a liquidated exchange will be deposited by the exchange officer with his immediate superior and will be disposed of by such officer as provided in paragraph 22g and h.

c. Partial liquidations. Whenever by reason of the decrease in personnel present at any post, camp, station, or installation, the amount of funds or

assets is greater than the amount required for current operation on a proportionately reduced basis, the commanding officer will report such facts to the commanding general of the service command who will direct the amount of such assets that will be retained by the exchange for its current operation. The commanding general of the service command will further direct that all assets over that amount be converted into cash and disposed of as provided in b (2) above.

d. Liquidation of exchanges outside of United States. Army Exchange Service will prescribe the procedure governing the liquidation of exchanges located outside the continental limits of the United States, provided that such procedure will be basically consistent with the provisions of b and c above.

8. Legal status. a. The legal status, rights, and liabilities of Army exchanges, exchange funds, property and personnel, commanding officers, exchange councils and exchange officers, and the rights as to litigation are determined by statute, the decisions of the Courts, the opinions of the Attorney General, and the Judge Advocate General of the Army. Subject to the foregoing and to these regulations, the Chief of Army Exchange Service is authorized to establish by interpretation the policy of the War Department upon the subjects noted. The Chief of the Army Exchange Service will distribute to exchange and other interested officers, in an appropriate manner, the necessary information

and procedures to insure understanding of such status, rights and liabilities.

b. Exchange operations will be governed by the policy interpretations based upon such decisions and opinions.

9. Exchange buildings and utilities. a. On military reservation.

(1) At posts, camps, stations, or installations where exchange buildings have not been provided from funds made available by the War Department, facilities may be secured by one of the following methods:

(a) The commanding officer will set apart for the use of the exchange any suitable public building or rooms available, or

(b) With the approval of the commanding general of the services command he may authorize the rental of any private building or part thereof on the reservation, the rental to be paid from exchange funds.

(2) Public or temporary buildings occupied by exchanges will be maintained by the post engineer out of funds applicable to the maintenance and operation of buildings, structures, and utilities on the particular post, camp, station, or installation.

(3) Fuel, water and electric services in sufficient quantities to satisfy normal needs for lighting, space heating, drinking, and sanitation, including suitable apparatus therefor, will be supplied at Government expense to exchanges and exchange enterprises, but fuel, water, or electric services will not be supplied

at Government expense for the operation of cooking devices, mechanical equipment, refrigeration electrical appliances, washing, cleaning, or power machinery for such enterprises as restaurants, tailor shops, barber shops, shoe repair shops, or any other activities operated by the exchange or concessionaires.

b. Not on military reservation. When deemed necessary or desirable to establish an exchange as provided in paragraph 4c, the commanding officer of the organization or activity will obtain the approval of the commanding general of the service command for the location of such exchange and the leasing of necessary facilities. When funds are not available from other sources, rental may be paid for appropriate space as provided in a (1) (b) above.

c. New construction.

(1) When facilities cannot be secured as provided in a(1) above, or when conditions make additional facilities necessary which cannot be secured as provided in a(1) above, a temporary building of a type, plan and construction approved by the Chief of Engineers may be erected, using wholly or in part the labor of troops and Government materials, tools and facilities as may be necessary and available.

(2) The exchange council, with the approval of the commanding officer, may recommend use of exchange funds for the erection of such temporary building when other assistance is not rendered. Any appropriation for such purpose must be approved

by the commanding general of the service command prior to obligation.

(3) The commanding general of the service command is authorized to approve the location of a building to be constructed under the provisions of (1) above.

(4) Buildings erected by exchanges on military reservations with proper authority and solely at their expense remain their property and may be sold by the exchange when no longer needed, upon written authorization of the commanding officer.

(5) Authority of the Secretary of War is required to permit the erection of temporary buildings on military reservations by private individuals or commercial concerns. This authority is not required for construction by exchanges, or when construction contracts between private individuals or commercial concerns and the exchange specify that immediately upon completion of the buildings, title thereto passes to the exchange.

(6) The exchange council, with the approval of the commanding officer, may, when necessary, recommend use of exchange funds to make alterations or additions to a building, provided no appropriations will be made when the cumulative total for alterations or additions to such building exceeds $1,000. Appropriation of amounts to be spent which exceed the $1,000 total, as provided above, must have, prior to obligation, the approval of the commanding general of the service command who will be governed by applicable Government limitations or regulations.

10. Activities. a. Authorized activities. An ex-

change may include, when approved by the commanding officer, the following activities and facilities:

(1) Main store, including military clothing and equipment.

(2) Branches.

(3) Warehouses.

(4) Soda fountain.

(5) Beer bar.

(6) Meat market.

(7) Vegetable and grocery market.

(8) Gasoline filling station.

(9) Automobile garage and service station.

(10) Restaurant or cafeteria.

(11) Barber shop.

(12) Beauty parlor.

(13) Laundry.

(14) Watch repair shop.

(15) Radio repair shop.

(16) Tailor shop, including dry cleaning and pressing.

(17) Shoe repair shop.

(18) Photographic studio.

(19) Vending and amusement machines.

(20) Gymnasium, including equipment for outdoor athletics.

(21) Recreation rooms, including billiard and pool tables, bowling alleys, and equipment for other indoor games when not provided by other services.

(22) Library supplied with books and periodicals when not provided by other services.

(23) Theater in which motion pictures, ama-

teur dramatics, and other entertainment may be conducted, if not provided by other services.

(24) Publication of a periodical.

(25) Taxicab and bus operation, subject to the following limitations:

(a) Unless strictly confined to service personnel and civilian Government employees as passengers, an exchange is not authorized to operate a taxicab or bus transportation facility nor to compete in any manner with civilian enterprise in such activity.

(b) The exchange may enter into a separate contract with any taxicab or bus company operating on the post, camp, station, or installation under a revocable license from the post commander, under which contract the exchange agrees to act as agent for such company for the sale of tickets entitling the holder to transportation.

(c) Under the limitations of b(1) below, the contract under (b) above requires the permission of the commanding general of the service command.

(d) For its services as such ticket agent the exchange may receive a legal commission. This should not exceed 10 per cent of the sales price of such tickets, and no part of such commission may be rebated or allowed in any manner as a credit to the purchaser of such ticket.

(e) Under the limitations described in (a), (b), (c) and (d) above, exchange coupons of

equivalent money cost may be used by ticket purchaser either to obtain transportation tickets or to pay such transportation cost in any manner included within the terms of such contract.

b. Limitations on activities.

(1) Activities other than those enumerated in a above will not be added to the business of an exchange without obtaining approval, through the Chief of Army Exchange Service, of the War Department.

(2) Except at stations located outside the continental limits of the United States and subject to the provisions of paragraph 11c, articles for sale will be limited to those articles of necessity and convenience as the commanding officer of the post, camp, station, or installation or the commanding general of the service command may determine desirable in view of local conditions. See also paragraph 12a(7).

(3) In all cases where the exchange acts as a collection agency for either a civilian activity or a concessionnaire, its liability will be limited to that of an agent and it will not be bound to perform any part of the customer's contract either by the payment of money or otherwise.

(4) Field exchanges may sell supplies obtained from quartermaster stores at cost price plus overhead cost fixed by the Secretary of War.

(5) The sale to enlisted men of regulation trousers, shirts, caps, belts, ties, socks, underwear, insignia, including cloth insignia such as chevrons,

shoulder sleeve and other patch type insignia, is authorized. The sale of articles of the uniform, except those specified above, similar to or as substitute for those issued by the supply service of the Army is forbidden.

(6) The operation of any gambling device, such as punch boards, slot machines, etc., by or in any exchange or exchange activity is prohibited.

(7) The sale of or dealing in beer, wine, or any other intoxicating liquors by any person in any exchange or upon any premises used for military purposes by the United States is prohibited. Beer with an alcoholic content of not more than 3.2 per cent by weight is considered nonintoxicating. See paragraph 33g.

(8) A periodical published by an exchange will not carry paid advertising.

(9) An exchange will not accept any gift or subsidy which might, directly or indirectly, be calculated to cause a preference in the purchase or sale of merchandise.

c. Concessions.

(1) So far as is practicable all of the authorized activities of the exchange will be conducted by the exchange.

(2) Subject to the provisions of (3) and (4) below, and when unusual conditions warrant, concessions may be granted by the exchange officer with the consent of the commanding officer, only for the conduct of activities indicated in a(6) to 18, inclusive, above.

(3) Concessions will not be granted private

individuals, firms, or corporations to operate any of the activities of the type listed in (2) above without the approval of the commanding general of the service command, and if the furniture, fixtures and equipment necessary to operate any such activity are owned by the exchange, in the absence of extenuating circumstances, such approval will not be given.

(4) A concession contract will be approved only when it embodies the express provision that the concessionaire assumes complete liability for all local taxes applicable to the property, income and transactions of the concessionaire.

(5) Contracts with concessionaires will neither state nor imply that any rental is to be charged the concessionaire for occupancy of space in buildings or for the use of utilities or facilities on the military reservation except as provided in paragraph 9a(3). The contract will contain provisions that the post authorities retain supervision of the activities and control of prices to be charged.

(6) When concessions occupy real estate not under control of the exchange, a license or lease is required (AR 100-60 and 100-62).

(7) A concessionaire is in no sense an agent of the exchange and will not be permitted to represent himself as such the public by the use of the words "—— Exchange" on letter or bill heads, signs, or in any other manner.

(8) The limitations imposed upon sales by exchanges apply equality to exchange concessionaires.

d. Vending and amusement machines.

(1) Vending and amusement machines may be installed in posts, camps, stations and installations by—

(a) Outright purchase for cash, or installment contract.

(b) Rental purchase.

(c) Loan.

(d) Rental.

(2) The negotiating agency for procuring vending and amusement machines at posts, camps, stations or installations will normally be the exchange.

(3) All vending and amusement machines installed on the post will be under the control of the exchange. Exception is made for those installed in hospitals, service clubs, and messes operated under the provisions of AR 210-60, for the benefit of the fund concerned, at the discretion of the post, camp, station or installation commanding officer, and except where specific War Department authority has been granted under the provisions of paragraph 8a(1), AR 210-50.

11. Army Exchange Service. a. The Army Exchange Service is that part of the Army which has jurisdiction over and provides staff supervision of the operation of all Army exchanges, and consists of such officers, enlisted men, and civilian personnel necessary to perform the functions assigned to it.

b. This Service will have jurisdiction over, and will be extended to, all exchanges of the Army through appropriate personnel on the staffs of commanding generals of service commands and commanding officers of posts, camps, stations and in-

stallations, at whose directions exchanges have been established.

c. With reference to all Army exchanges, the Army Exchange Service is charged with—

(1) Developing policies, plans, and procedures for and supervising the installation and operation of—

(a) A uniform and coordinated system of operating procedures, pricing policies, and merchandising methods, including the safeguarding of exchange funds and property, and the determination of permitted types of merchandise to be sold by exchanges.

(b) Personnel policies and procedures, to include insurance plans, in-service training programs and training of exchange officers.

(c) Accounting and auditing methods and procedures.

(d) Minimum and maximum percentages of gross profits, operating expenses, and net profits.

(e) The regulation of dividends.

(f) Determination of type of equipment and fixtures to be used by exchanges.

(g) Establishment of fees to be paid by exchanges to the Army Exchange Service for services enumerated herein.

(2) Performing the following functions:

(a) Providing and prescribing the use of purchasing and fiscal services.

(b) Obtaining price agreements from manufacturers and distributors on items purchased

by exchanges, and prescribing the use of such price agreements.

(c) Administrating all funds accruing to the Army Exchange Service.

(d) Negotiating for and providing funds to be loaned to exchanges under such regulations as the Chief of Army Exchange Service may prescribe.

(3) Transmitting to exchange officers and personnel in an appropriate manner necessary information as to all activities within the scope of the foregoing duties and functions.

(4) Exercising an advisory and policy-making function for the War Department in all other matters within the scope of the foregoing duties and functions.

12. Purchases. a. For exchange.

(1) Except as authorized in (a) and (b) below and paragraph 18o, all purchases of merchandise or other property will be made by the exchange officer who will notify all vendors on the purchase order, or by other appropriate means, that the contract is made with the exchange and not with the United States Government.

(a) Exception to the above requirement is authorized when, by reason of absence on other duty, the exchange officer may not advantageously make such purchases. In these cases the exchange office manager may, when specifically authorized by the commanding officer, make routine purchases in limited quantity.

(b) In large exchanges maintaining a pur-

chasing department and stock control system, routine replacement of lines of merchandise handled in the exchange may be made by the head of the purchasing department from a list of dealers authorized by the exchange officer.

(2) The exchange officer will, in all cases, be responsible for the purchase made by any subordinate as authorized in (1) (a) and (b) above.

(3) Purchases made verbally by the exchange officer, or as provided in (1) (a) and (b) above, will be confirmed by written purchase order immediately thereafter.

(4) Inventories will be held to a reasonable minimum.

(5) Purchases at prices in excess of those published in Army Exchange Service price agreements (par. 11c) are not authorized except to supply immediate needs to exchanges operating in the field, or in emergencies due to lost or delayed shipments or other like circumstances, or when procurement, delivery, or price considerations render it to the interest of the exchange to purchase from local distributors.

(6) (a) All purchases within the continental limits of the United States by exchanges located outside the continental limits of the United States will be made through Army Exchange Service.

(b) Commercial and financial transactions of any type within the United States by exchanges located outside the continental limits of the United States will be conducted only through Army Ex-

change Service in accordance with provisions prescribed by the Chief of Army Exchange Service.

(7) The purchase or sale by Army exchanges of articles of military uniform and equipment not in conformity with the provisions of AR 600-35 is forbidden.

b. For concessionaires. The purchase by the exchange of material needed by concessionaires in the operation of their concessions is permitted only after all taxes involved, if any, have been advanced by the concessionaire and when such material is not to be resold.

c. All goods or property purchased by or for the account of an exchange will be accounted for on its books.

d. No merchandise will be held on consignment or to be paid for by exchanges when sold. The provisions of this subparagraph will not be construed as prohibiting the established business practice of making an agreement, at the time of purchase, for the return to the vendor for credit of unsold seasonable merchandise at a specific time.

e. Restrictions on purchases.

(1) Purchases by the exchange of merchandise and equipment will be so regulated that, except as provided in (2), (3) and (4) below, the cash on hand and accounts receivable at any time will be sufficient to pay all invoices within the discount period and to pay other current liabilities as they become due.

(2) Purchases made during the first 3 months following the initial establishment of an exchange

may, when recommended by the council and approved by the commanding officer, be paid for not later than the 15th of the second month following such purchases.

(3) Except for transactions provided for in a (6) above, exchanges outside the continental limits of the United States may, on recommendation of the exchange council and approval of the commanding officer, deviate from the provisions of (1) and (2) above where conditions make such deviation necessary.

(4) The commanding officer upon recommendation of the exchange council may authorize the payment, by not to exceed 12 monthly payments, for equipment and fixtures for exchange operations. See paragraph 17b(12) and 33c.

(5) In the establishment of new exchanges, the stock of merchandise and investment in equipment and fixtures will be held to a minimum consistent with efficient operation.

13. Sales. a. To whom made. Exchanges are authorized to sell to the following-named persons and organizations only. Purchases by individuals will be limited as hereinafter set forth.

(1) Personnel and organizations now or hereafter authorized by law and regulation to purchase subsistence stores or other quartermaster supplies as defined in paragraphs 2 and 6, AR 30-2290, may purchase at exchanges. Dependent members of the families of persons so authorized may act as agents for such persons upon proper identification.

(2) Civilians other than those above defined and

who are regularly employed or serving at military posts, camps, stations or installations may purchase for their own consumption on the post, upon proper identification, items of food, drink and tobacco products and no other merchandise of any kind.

b. Sales to Government. Sales to the Government by exchanges are authorized only in cases where the same class of service cannot be conveniently or reasonably obtained elsewhere and where a direct advantage will accrue to the Government from the method resorted to. In no case will an exchange or concessionaire bidding as such be permitted to enter into public competition or to submit bids in response to advertisements calling for proposals for furnishing supplies or services. When accounts are submitted for sales of the kind described, the vouchers will contain a full statement of the grounds upon which the sale of supplies or services was based and will fully set forth all the circumstances of the transaction with a view to enabling the proper agencies of the United States Government to determine whether such purchase was in the public interest.

c. Coupon books.

(1) The sale of coupon books for cash is authorized. The exchanges will make available coupon books to all branches and activities approved by the commanding officer.

(2) Coupon books when sold will show the name and organization of the patron and will be authenticated by the exchange representative making the

sale. Coupons will be accepted by the exchange or concessionaire only when presented undetached from the book by the person whom issued, except that a chaplain or surgeon may make purchases with detached coupons for men sick in the hospital. Any person who discovers counterfeit coupons or the misuse of coupons will immediately notify the exchange officer who will take appropriate action.

(3) When organizations are to be transferred from a post, camp, station, or installation, the exchange officer will make arrangements with the commanders of such organizations to redeem for cash the unused coupons in the hands of members of such organizations. If the time element involved in the transfer of troops from the post, camp, station or installation is such as to make impossible the immediate cash redemption of exchange coupons, the organization commander will collect such unused portions of coupon books and forward them to the exchange officer for a consolidated settlement. The organization commander, upon receipt of the redemption value, will make distribution to the individual members concerned.

(4) Coupon books will not be sold at a discount.

d. Credit sales.

(1) Exchanges are prohibited from making credit sales to individuals either of merchandise or coupon books.

(2) Organizations which are authorized to buy at exchanges are entitled to buy on credit.

e. Special orders. Exchanges may purchase by special order only for officers and enlisted personnel,

items of personal military necessity not usually carried in stock.

14. Profits. a. General. The commanding general of the service command is responsible that exchange profits are within the limits prescribed under the authority of paragraph 11c.

b. Funds available for distribution. The amount of cash and other liquid assets, except inventories, in excess of current liabilities, including due portions of notes or installment contracts, as shown on exhibit E of the monthly financial statement, is the amount of funds available for distribution, except that any funds in excess of the total accrued net profit since the date of the last financial statement upon the basis of which a distribution was made will not be available for distribution. Any departures from this method of determining funds available for distribution will be upon the recommendation of the exchange council and the commanding officer, and approved by the commanding general of the service command.

c. Participation by organizations.

(1) Batteries, companies, squadrons, troops and any other units organized under Tables of Organization, detachments, allotments to service commands, or exempted activities, except as provided for in (2) below, will participate in the net profits of an exchange if served by the exchange for a period of more than 10 days, provided that no organization will participate in any distribution of net profits where the share thereof is less than $10.

Enlisted men being processed through a reception center will not be included in the average strength report of the organization for the distribution of exchange funds unless present for more than 10 days. An organization will cease to participate in such net profits from the date of its departure from the post, camp, station or installation unless served by such exchange or a branch thereof during its absence therefrom.

(2) Organizations passing through staging areas or ports of embarkation will not participate in exchange profits. The sales price of articles sold by exchanges at staging areas or ports of embarkation will be maintained at a minimum in order that benefits that would ordinarily accrue will be passed on to such organizations direct by the exchanges.

d. Distribution of funds. The exchange council, when recommending the distribution of available funds for approval of the commanding officer, will assure itself that exhibit E of the monthly financial statement is complete and, subject to any limitation imposed under the provisions of paragraph 11c will, after obtaining such approval, make disposition of all available funds currently and as provided below.

(1) Special reserves. To set aside limited cash reserves for projects, only in specific amounts and for specific purposes, such as anticipated expansion of exchange activities and addition to recreational and welfare activities.

(2) Appropriations. Such sums as the council

recommends and the commanding officer approves will be appropriated as follows:

(a) To the post, camp, station or installation recreation fund and to the Chaplain's fund as provided in AR 210-50.

(b) To the post band or to bands of member organizations, and to headquarters funds, which do not otherwise participate in exchange distributions, in accordance with a schedule provided or approved by the commanding officer.

(c) For the benefit of the entire garrison, such as laying out, preparing and cultivating gardens and necessary seeds, roots and plants exclusive of any commercial activity; purchase and maintenance of books, newspapers, periodicals, stationery, etc., for the exchange or post library; purchase of gymnasium equipment or outdoor athletic equipment for free use of the command, and for prizes for athletic competitions for the garrison or such other military organizations as may be temporarily quartered on the reservation.

(d) To the recreation fund for the purchase of furniture and equipment for day rooms in barracks. The furniture and equipment so purchased will remain the property of the post, camp, station or installation and will be for the free use of any units quartered in the barracks for which such room is equipped.

(e) Appropriations for purpose other than those listed above require the approval of the commanding general of the service command.

(3) To organization funds. An amount of available funds will be disbursed to participating organizations and detachments, in accordance with limitations prescribed under the authority of paragraph 11c (1) (e) and subject to the limitations of c above, prorated upon the basis of each organization's average morning report of present enlisted strength during the period since the date of the financial statement upon which the last distribution was made. The distribution herein contemplated will include proportionate distribution and payment to organizations that have departed the station during the accounting period except as provided in c above.

(4) Contingency reserve. Any amount remaining after distribution as provided in (1) to (3), inclusive, above, will be placed in a contingency reserve and should be invested in obligations of the United States Government.

(5) Payment to departed organizations. Payment to organization funds of the amount determined under (3) above or the payment of any other indebtedness due to organizations that have left the continental United States or removed to a place address unknown will be made to Army Exchange Service for transmittal to such departed organizations.

(6) Disposition of funds due to organization disbanded. When it is determined under (3) above that a distribution should be made to an organization disbanded, the amount due will be set aside to be disposed of in such manner permitted by these

regulations as may be recommended by the exchange council and approved by the commanding officer. If an organization departed prior to disbanding and the amount due is transmitted for payment as provided in (5) above, Army Exchange Service will return the funds to the exchange officer for disposition as provided in this subparagraph.

Section II
Personnel

15. General.

a. (1) So far as is practicable, exchanges will be operated by civilian employees, with Army officers in executive control.

(2) Great care will be exercised in the selection of personnel in order that an efficient and permanent body of civilian employees may be developed.

b. In exchanges the entire operation is conducted by an exchange officer, and such assistant exchange officers and civilian assistants and enlisted men as authorized in paragraph 21 as may be necessary for the proper conduct of the exchange.

16. Commanding officer. a. The commanding officer, subject to the provisions of paragraph 11 and subject to the administrative control of the

commanding general of the service command, has complete jurisdiction over and is responsible for the conduct of the exchange pertaining to his command.

b. Subject to the provisions of paragraph 11, he will carefully select and appoint the exchange officer who must be fully in sympathy with the purpose of the exchange and possess the business qualifications for its successful operation. For large exchanges a field officer of extensive experience should be selected. Frequent replacement of efficient exchange officers is detrimental to successful operation.

c. He will appoint such assistant exchange officers and detail such enlisted men as may be necessary to conduct the exchange business. See paragraph 21.

d. He will appoint the exchange council as prescribed in paragraph 17a(1).

e. He will appoint officers to take the inventory as prescribed in paragraph 24b, and that inventory taken upon transfer of the exchange from an exchange officer to his successor.

f. He will, when field representatives for auditing purposes are not provided by the commanding general of the service command, appoint a qualified officer to make the audit prescribed in paragraph 26.

g. He will consider and take formal action on the proceedings of the exchange council as recorded in the exchange council book and enter as a remark on the financial statement therein his certificate that the exchange was operated, during the period cov-

ered by the report, in compliance with the annual Military Appropriation Act.

h. In case of his disapproval of the recommendations of the exchange council, he will transmit his comments thereon to the council and, in case of continued disagreement, will submit the proceedings to the commanding general of the service command whose decision in the matter will be final.

i. All contracts involving service, equipment and concessions to be executed by the exchange officer require the approval of the commanding officer prior to the execution. See paragraph 33.

17. Exchange council. a. Organization and procedure.

(1) An exchange council, appointed by the commanding officer, will be established as an advisory body to the exchange officer and the post commander.

(2) The membership of the council, appointed by the commanding officer, will consist of the exchange officer and not more than six officers selected from the command. The commanding officer will not be a member of the council except when there are not more than three officers on duty at the post.

(3) The senior member of the council will preside, unless he is the exchange officer, and the exchange officer will act as recorder at meetings of the council.

(4) The council may delegate to an executive committee of its members any specified portion of its duties, but in such a case the council retains its responsibility.

(5) Each member of the council will have one vote.

(6) The council will meet at such times as may be directed by the commanding officer or requested by the exchange officer.

b. Duties. The duties of the council are to—

(1) Examine the inventorying and auditing officers' reports, ascertain that the inventory and audit have been made in accordance with these regulations, and take cognizance of and recommend action upon any irregularities discovered.

(2) Examine the sources of profits and losses and recommend action in appropriate cases.

(3) Make recommendations regarding all major expenditures other than those for merchandise and expense incident to the usual operation of the exchange.

(4) Recommend amount of remuneration of employees.

(5) Insure that the proceedings of the council are recorded in the council book and that the council book is kept as prescribed in d below.

(6) Recommend appropriations and distributions to organization funds as prescribed in paragraph 14.

(7) Consider the reports of the committee of noncommissioned officers and make recommendations in connection therewith when indicated.

(8) Recommend changes in the policy, organization, or scope of activities of the exchange not inconsistent with the expressed policies of higher authority or these regulations, and to recommend

to the commanding officer the adoption of such policies as will insure sound public relations.

(9) In those cases where superior authority does not prescribe, recommend the articles to be sold and those that are to be discontinued and, with due consideration for the purposes of the exchange stated in paragraph 3, recommend the prices at which such articles will be sold.

(10) Recommend prices to be charged for services or admissions to any of the activities of the exchange, including those of concessionaires.

(11) Make recommendation of action to be taken in all cases where the sales accountability report shows a shortage or overage of more than 1 per cent of the gross sales in any department or activity except manufacturing activities.

(12) Recommend the terms of any rental or installment purchase contract to be entered into by the exchange (par. 12e(4)). See paragraph 33c.

(13) Recommend the amount and terms of repayment of funds to be borrowed from the Army Exchange Service for the purpose of financing new or expansion of established exchanges.

(14) Inquire into compliance with these regulations and recommend action upon any irregularities discovered.

c. Liability of council. See paragraph 8.

d. Council book. The council book will consist of—

(1) The minutes of the meetings, including a formal record of attendance and absentees by name and grade, signed by the presiding officer and re-

corder, with reports of executive committees, when appointed by the council, attached as exhibits.

(2) A record of the action of the commanding officer upon the proceedings and recommendations of the council.

(3) The certificate of inventory officers as provided in paragraph 24a.

(4) The financial statements of the exchange (exhibits A to F, Manual of Uniform System of Accounts), including those made upon transfer of the exchange from one exchange officer to another as prescribed in paragraph 18e(2).

(5) The reports of auditing officers prescribed in paragraph 26g.

18. Exchange officer. a. The exchange officer is in executive control of the exchange. He is responsible for its management and accounting, the performance of duty and discipline of assistants and employees, and is the custodian of its property and funds.

b. He will acquaint himself with the principles of modern accounting and be responsible that the principles of the exchange accounting system are in conformity with these regulations, and with the Manual of Uniform System of Accounts issued by the Army Exchange Service.

c. (1) He will keep exchange funds except as provided in (2) below, in his exclusive personal control either in the exchange or by depositing them as follows:

(a) When practicable, in national bank. In cases where the working balance of funds is

greater than the amount of the Federal insurance of deposits, appropriate working balances will be fixed by action of the council, approved by the commanding officer. Any funds in excess of appropriate working balances will be—

1. Invested in Government securities in accordance with policies to be promulgated from time to time by the Chief of the Army Exchange Service, or

2. Such cash reserves as may be authorized by duly constituted authority may be deposited in a separate account.

If bank balances exceed the amount of the Federal insurance of deposits it is the responsibility of the exchange officer to require the bank or banks to deposit adequate collateral to secure the safety of such excess.

(b) In State bank, when impracticable to deposit in national bank. Deposits should be made, when possible, in a State bank which is a member of the Federal Deposit Insurance Corporation. The provisions of (a) above will govern except that a State bank may not be required to deposit collateral to secure such excess funds. The exchange officer will therefore be required to secure the cooperation of the bank or banks in arranging for such collateral, if not contrary to the laws of the State in which such bank is chartered.

(2) The exchange officer may, with the approval of the commanding officer, entrust exchange cash

to assistant exchange officers and bonded employees in amounts not greater than minimum requirements for change and petty cash disbursements at branches or departments.

(3) He will be responsible that none of the personnel of an exchange has in his or her possession exchange funds in excess of his or her bond. All funds entrusted to exchange personnel will be recorded in such manner as to permit recovery against the surety in case of loss or default.

(4) He will not permit an accumulation of funds in the exchange office at any time in excess of the requirements of the business or as dictated by the accessibility or limitations of banking facilities. He will apply to the commanding officer for adequate guard to protect any substantial accumulation of funds in the exchange.

(5) He will be in sole control of exchange bank accounts. Authority to make bank transactions other than deposits will not be delegated to any other person unless, after a request by the exchange officer, it is so recommended by the exchange council and approved by the commanding officer.

(6) He will be responsible for the proper taking of inventory by exchange personnel. See paragraph 24a.

(7) Funds of exchanges, although not public moneys within the meaning of sections 5488, 5490 and 5492 of the Revised Statutes, are entrusted to officers of the Army in their official capacity and their misapplication is punishable under the Articles

of War. The loaning of exchange funds is prohibited.

(8) He may, when there is no United States Army disbursing officer readily accessible, cash final statements of discharged enlisted men with exchange funds, retaining a portion sufficient to afford protection against loss due to error until the final statement has been paid by a disbursing officer and then remitting the balance, less any expense of the transaction, to the discharged enlisted men. The exchange assumes no liability for overpayment made by United States Army disbursing officers, this liability resting on the officer who signs the final statements or the United States Army disbursing officer who pays them, according to the source of error.

(9) He may use exchange funds to cash checks, with the authority and under such restrictions as may be recommended by the exchange council and approved by the commanding officer. Any fees or bank charges involved will be paid by the persons for whom the checks are cashed.

(10) He will be responsible that the combination of each safe in the exchange is known only to two persons, other than himself, who will be accountable for the funds safeguarded therein, and that the safe combination is changed when the responsibility for funds is transferred from such persons to other persons. A copy of the combination of each safe will be deposited in a sealed envelope with the post adjutant.

(11) When the necessity or volume of the business of an exchange render such action desirable,

the commanding officer may in his discretion authorize the exchange officer to use a mechanical or electrical check signing machine of a type approved by insurance underwriters, except that the use of such machine will not relieve the officer of any responsiblility in the issuance and safeguarding of checks.

d. He will be responsible that the provisions of paragraph 12 are complied with.

e. He will be responsible that, upon his assumption of or relief from the duties of exchange officer, the following procedure is carried out:

(1) If for a temporary period, the exchange officer will be relieved of control of and responsibility for exchange operations, property, and funds for such period beginning with the close of business of the day of transfer to the relieving officer, as shown by memorandum receipt, and ending with the resumption of such control and responsibility at the close of business on the day of return, as shown by memorandum receipt. Such receipts will be recorded in the exchange council book.

(2) If the relief is permanent, an inventory as prescribed in paragraphs 16e and 24 will be made supporting a statement of assets and liabilities certified by the officer relieved to be complete, true and correct to the best of his knowledge and belief and signed as a receipt by the relieving officer. The signed statement forms a part of the council books as prescribed in paragraph 17d(4).

f. He will make sure that no concessionaire of the exchange represents himself to the public as the agent of the exchange by the use of the words "——Exchange" in the title of his business or in any other manner.

g. He will enforce upon concessionaires the limitations imposed by these regulations.

h. He will be responsible that no officer charged with any duty in connection with the exchange receives any extra remuneration therefor and that no officer or employee accepts or receives any gift, privilege, or perquisite from the exchange or from vendors or vendees of the exchange.

i. He is, within the specific authority vested in him by these regulations, empowered to execute contracts in the name of the exchange.

j. He will, with regard to recommendations of the council and in conformity to applicable Government regulations, employ and fix the pay of civilian employees of the exchange.

k. He will, upon assuming the duty of exchange officer, carefully ascertain the number of each denomination of unissued coupon books on hand and thereafter insure that a record is kept of receipts and issues of such books to agents of the exchange who make sales direct to enlisted patrons.

l. He will be the custodian of redeemed coupons turned in with the manager's daily report and, the count having been verified, he or an assistant exchange officer will personally witness the destruction of all coupons so received.

m. He will see that the accounting system is

maintained and operations conducted in such a manner as to provide adequate measures for the control of losses through dishonesty of employees or customers.

n. He will make certain that all of the incoming first-class mail for the exchange is received and opened by him personally or by an assistant exchange officer or other designated and responsible person.

o. The exchange officer may delegate to an assistant exchange officer any or all the duties of the exchange officer except in cases where laws and regulations make the performance of the duty mandatory on the part of the exchange officer.

p. The exchange officer will be financially liable for losses of exchange funds and property where the loss was by reason of his negligence or dishonesty. See paragraph 8.

19. Assistant exchange officer. Assistant exchange officers perform such duties as may be prescribed by the exchange officer.

20. Exchange office manager. a. The exchange office manager is a civilian assistant of the exchange officer.

b. In the informal absence of the exchange officer and assistant exchange officers, he is in immediate control of the exchange and may act for them in accordance with the policies of the exchange officer. In such cases the exchange officer retains responsibility for the actions of the manager.

c. The manager's duties, to be performed in small exchanges by himself or, in large exchanges,

under his supervision and responsibility, are as follows:

(1) He will keep the books and records of the exchange except those prescribed to be kept by the exchange officer.

(2) He will make such spot checks and verifications of the exchange accounting, coupon books, etc., as will insure accuracy and fidelity on the part of his subordinates in the exchange.

(3) He will keep the stock and sales accountability records except where he personally is the custodian of the stock room or sales room. See paragraph 23c.

(4) He will be responsible and account for the coupon books turned over to him by the exchange officer.

(5) He will collect, safeguard, and turn over to the exchange officer daily the cash and coupons received for sales and the receipts for petty cash disbursements.

(6) (a) He will prepare and submit to the exchange officer a manager's daily report (see Manual of Uniform System of Accounts).

(b) In large exchanges where assistant managers or other employees perform part of the duties of the manager either in charge of branches or as cashiers, etc., each of them will make a daily report of his transactions, which may, if desired, be consolidated into one daily report covering all activities (see Manual of Uniform System of Accounts).

(c) The data in the manager's report will

be verified and initialed by custodians of departments, certified correct by the manager, examined and approved by the exchange officer or assistant exchange officer, and permanently filed in chronological order.

(7) He may make purchases of merchandise as provided in paragraph 12a.

21. Enlisted employees. a. The commanding officer of the post, camp, station or installation may, subject to the approval of the commanding general of the service command, authorize the use of enlisted men in exchanges.

b. Position responsibility of enlisted employees will be as prescribed for civilian personnel.

c. The wage of an enlisted employee will not exceed one-half of his base pay exclusive of allowances or other increase unless otherwise determined by the commanding general of the service command.

d. The employment of enlisted men by exchange concessionaires is prohibited.

e. The commanding officer of tactical troops not located on military reservations is authorized to use enlisted men in the operation of the exchange without obtaining approval of the commanding general of the service command.

Section III
Operations

22. Accounting and bookkeeping. a. This phase of exchange operations is covered in a separate publication entitled "Manual of Uniform System of Accounts, Forms and Accounting Procedure for Post, Camp, Station and Field Exchanges," in which detailed bookkeeping, accounting, auditing, financial statement, and supplementary forms are provided.

b. All exchanges will install the system prescribed therein. The small exchange, which does not have a warehouse, may use only that part of the system which is applicable as indicated in section VII thereof or as otherwise provided for by the Army Exchange Service.

c. In exceptional cases, the Chief of Army Exchange Service may permit, in writing, deviation from a and b above.

d. All transactions will be recorded and posted currently so that periodic audits, statements and reports can be made without delay.

e. (1) Copies of such financial or other reports as the Chief of Army Exchange Service may direct will be forwarded promptly to the commanding general of the service command and to the Army Exchange Service, War Department.

(2) The remittance of the prescribed percentage of the gross sales payable to the "Army Exchange Fund" as provided in paragraph 11c will be forwarded monthly to the Chief of Army Exchange Service.

(3) The Exchange Branch of the service command headquarters will consolidate and forward such reports to the Army Exchange Service as from time to time directed by the Chief of Army Exchange Service.

f. Consistent with the volume of business, use should be made of efficient business machines purchased from exchange funds.

g. Destruction of old records. All invoices, canceled checks, papers, and books relating to the business of an exchange, except the exchange council book, and pertaining to accounts that have been closed more than 3 years, may be destroyed as no longer required for the protection of the exchange, except in the case of an exchange where the statute of limitations prescribes a longer period on such accounts, in which case the papers will be kept for such longer period, unless with respect to an entry or omission of an entry therein a civil claim or criminal action shall have been presented or initiated, under which circumstances the destruction of the records concerned will be postponed until

after final disposition of the claim or criminal action. Under the direction of the commanding officer, the papers specified will be destroyed by the exchange officer who will record the action in the exchange council book.

h. Disposition of records when post is abandoned. In the event of the abandonment of a post, camp, station or installation, the exchange council book, together with all records not destroyed as above provided, will be forwarded to the commanding general of the service command for appropriate disposition.

23. Stock records and sales accountability. a. A form of stock record and detailed procedure in the operation thereof are described in the Manual of Uniform System of Accounts. No deviation in principle will be permitted.

b. (1) In small exchanges merchandise may be charged direct at selling prices to the sales accountability record, placed immediately in stock, and accounted for on the inventory.

(2) A form of sales accountability record and detailed procedure in the operation thereof are described in the Manual of Uniform System of Accounts. No deviation in principle will be permitted.

c. In order that responsibility for shortages developed by stock or sales accountability records may be definitely placed, it is necessary that separate accountability be set up for each department or subdivision for which a control is required. In no case will the custodian keep his own accountability or make entries therein except for his own information. In small exchanges conducted by an

exchange officer and a manager, the exchange officer will keep the accountability record.

d. Accountability for manfacturing activities such as restaurants, meat markets, etc., where the merchandise received loses its identity, before sale is not authorized.

24. Inventory. a. The Chief of Army Exchange Service will prescribe the procedure for and frequency of inventories. When an inventory is taken it is the direct responsibility of the exchange officer and employees of the exchange, particularly those charged with stock or sales accountability, that the assets are inventoried for the inventory officer. It is the responsibility of the inventory officer to make a sufficient recheck of the inventory so he can certify that it is correct to the best of his knowledge and belief.

b. The inventory officer and assistants appointed under paragraph 16e will, at a designated time, make a recheck of the inventory of the exchange, to include merchandise, fixtures, equipment, general supplies, containers and unissued coupon books.

25. Commanding general of service command—Specific duties. a. See paragraphs 4, 7, 9, 10, 11, 14, 16, 21, 22, 26, 27, 28, 33 and 34.

b. The commanding general of the service command, as provided in AR 170-10, is charged with—

(1) General supervision of exchange operations and management. The commanding general of the service command may take appropriate action on any matter pertaining to an exchange investigated and reported upon.

(2) Auditing the accounts of exchanges.

26. Auditing. a. A balance sheet audit will be made of each exchange not less frequently than quarterly. Where conditions of operation and management make it advisable, more frequent audits will be made. The commanding general of the service command will be responsible that all such audits are made.

b. Annual or more frequent unannounced examinations of each exchange will be made as directed by the commanding general of the service command.

c. A qualified field representative officer will be provided by the commanding general of the service command to perform the audit. When this is not possible and the commanding officer so notified, a qualified officer will be detailed by the commanding officer as provided in paragraph 16f.

d. (1) The procedure outlined in the Manual of Uniform System of Accounts will serve as a guide for auditing. It is the responsibility of the auditing officer that he develops by it sufficient assurance to enable him to certify as required in g(10) below.

(2) The auditing officers need not be limited by the procedure outlined in the Manual of Uniform System of Accounts or other prescribed procedures. Any matter pertaining to the exchange may be investigated and reported upon, together with recommendations in connection therewith.

e. (1) Upon the completion of the financial statements by the exchange, the auditing officer will make a balance sheet audit for the period since the

previous audit or longer period, if so directed by the commanding general of the service command.

(2) In making a balance sheet audit, the auditor will verify the assets and liabilities of the exchange, including a test check of income and expense items, ascertain whether the accounting procedures are correct and in compliance with regulations and whether the financial statements (exhibits A to F, Manual of Uniform System of Accounts) are in agreement therewith.

f. (1) Upon the request of the commanding officer and with the approval of the commanding general of the service command, the auditing officer will make a detailed audit for the period since the previous audit or longer period, as directed by the commanding general of the service command.

(2) In making a detailed audit, the auditing officer will assume complete control of the exchange and its activities and, in addition to the procedure described in a(2) above, will make examination and verification from original sources of all entries in the accounting records for the audit period; verify the status of accounts by means of confirmation letters mailed to debtors and creditors; and recommend a reappraisal of assets where indicated.

g. Upon completion of the audit, the auditing officer will prepare a report to the commanding officer of the post, camp, station or installation at which the exchange is located, a copy of which will be forwarded by the auditing officer to the commanding general of the service command, to include—

(1) Authority, type of audit made, and the period covered by the report.

(2) Scope of the audit.

(3) Qualifying comments on items appearing on the financial statements.

(4) Comparison of the result of operations of the period under review with the preceding period.

(5) Statement of the amount of funds available for distribution, taking into consideration the amount of profit accrued since the last distribution.

(6) List any department whose accountability overages and/or shortages exceed 1 per cent of such department's gross sales and recommendations as to the action to be taken.

(7) List of delinquent accounts receivable as of the date of audit.

(8) Statement of insurance coverage, showing the type of coverage and the amounts in total or limit for each type, together with a statement as to the adequacy of the coverage in conformance with paragraph 31.

(9) General comments and recommendations.

(10) Certificate: "I/we hereby certify that in my/our opinion, subject to the foregoing comments, the statements herein contained correctly state the financial condition of the ..... Exchange on ....., and the results from operations for the period from ..... to ....., inclusive."

(11) Financial statements, exhibits A to F, inclusive, (Manual of Uniform System of Accounts).

h. Where public accountants are employed to audit, the report above prescribed will be amended to the effect that the auditing officer has, with their

assistance (stating the name of auditing firm), made the required audit.

27. Civilian auditors. Under unusual circumstances and only after approval by the commanding general of the service command the commanding officer may authorize the employment of a qualified civilian accounting firm at stated intervals to audit the accounts of the exchange at its expense. In such cases the commanding officer, the exchange council, and the auditing officer retain their full responsibility. The officer designated as the auditing officer may work with the accountant, in which case he is authorized to amend the certificate required of him as indicated in paragraph 26h.

28. Boards of officers. Boards of not less than three disinterested officers will be appointed by the commanding officer to investigate and report upon losses sustained by an exchange where any question of personal liability or responsibility is involved. Boards making such investigations will include in their reports their opinions as to responsibility for the loss and recommendations as to appropriate action for decision of the commanding general of the service command.

29. Committee of noncommissioned officers. a. To insure adequate consideration of the interests of enlisted personnel, the commanding officer will appoint a committee of noncommissioned officers for the entire command to be not less than three nor more than six in number.

b. This committee will meet at the call of the commanding officer at least once in each quarter and oftener, if he desires. The committee will submit

to the commanding officer, either orally or in writing, views of the enlisted personnel concerning desirable changes in or addition to internal operations of the exchange. Such views will be transmitted by the commanding officer to the exchange council and recorded in the council book, together with such action as the commanding officer may direct in connection therewith.

30. Losses. As to losses caused by negligence or mismanagement, see paragraph 18p.

31. Insurance. a. General. Exchanges will procure adequate insurance coverage against types of losses and liabilities as prescribed from time to time by the Chief of Army Exchange Service.

b. Surety bonds. The exchange officer, assistant exchange officers, and each employee, including the exchange office manager, who is entrusted with the custody of any money or property of the exchange or accountability therefor, such as warehouse managers, storekeepers, clerks, branch managers, cashiers, and bookkeepers will be bonded by a reputable bonding company as surety, at the expense of the exchange, in an amount that will protect the exchange from loss in case of defalcation. Limitations which may be imposed by other Army Regulations on the amount of bonds covering accountable officers and employees will not be applicable to exchange officers or personnel. Coverage will be written under a Position Schedule form of bond, unless the number of positions bonded justifies the purchase of a Blanket Position bond at a lower premium.

c. Policies covering liability insurance will con-

tain a stipulation, or rider, to the following effect:

> The company agrees that the fact that the insured is a Government instrumentality will not be interposed as a defense in any lawsuit in which the company's liability under this policy is in any way concerned, unless so requested in writing by the insured.
>
> In no case will such defense be requested of the company by an exchange unless and until it has been specifically authorized to do so by the War Department.

d. Accounting and asset inventory records of the exchange will be kept closely up to date and in proper form to facilitate the settlement of insurance claims.

e. Group insurance for civilians. Expenditure of exchange funds is authorized for the payment of the employer's portion of the cost of a contributory group insurance plan for civilion employees.

32. Taxes. a. Federal taxes.

(1) Exchanges are Government instrumentalities expressly recognized by Congress in annual appropriation acts and by the courts. Since it has never been the general policy of the Government to tax its own enterprises or its own manner of conducting business, exchanges are exempt from the payment of Federal income taxes, of excise taxes on furs, cosmetics and jewelry. Exchanges are also exempt from the payment of Social Security Taxes.

(2) Exchanges within the purview of the Reve-

nue Act of 1914 (38 Stat. 716) are subject to the stamp taxes imposed by that act. Accordingly such exchanges are not permitted to sell merchandise on which special Federal stamp taxes are required until such stamps have been affixed. See JAG 012.2, April 8, 1913.

(3) Federal manufacturers excise taxes are payable by the exchange on merchandise purchased for resale. Merchandise for use of exchanges and not for resale is exempt. In the latter case the use of tax exemption certificates are authorized.

b. State taxes.

(1) Consent has been given by the Federal Government to the imposition of State gasoline taxes on sales by exchanges for use in vehicles other than United States Government-owned or used vehicles. Army exchange vehicles being used for a governmental function are entitled to all the rights and exemptions of government-owned vehicles and gasoline used in exchange vehicles is exempt from the payment of such tax to the State. In general, no sales, income or property taxes of any nature, or occupational taxes, direct or indirect, are payable by exchanges to any State, or subdivision thereof, or territorial government.

(2) Questions as to whether any taxes noted in (1) above are payable which arise within the geographical limits of a service command, department, or foreign government, will be forwarded to the commanding general of the service command for decision. The commanding general of the service command may, when necessary, forward any such

question to the Chief of Army Exchange Service accompanied by the opinion of the judge advocate of such service command. The Chief of Army Exchange Service will determine such questions or, if he deems it necessary, forward the question to the Judge Advocate General for decision. In no event will a ruling by State, territorial, or local authority that such a tax is payable be acted upon without reference as hereinabove directed.

c. Social Security Act.

(1) The Commissioner of Internal Revenue in a letter dated September 29, 1942, ruled that services performed "in connection with the operation of Army exchanges are excepted from 'employment' by reason of the provisions of paragraphs (6) of Sections 1426 (b) and 1607 (c) of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, respectively. Accordingly, the Federal employment taxes are not applicable with respect to such services."

(2) The ruling of the Commissioner of Internal Revenue is considered applicable to State as well as Federal taxes. Therefore, exchanges will not pay or collect Federal or State taxes attempted to be imposed under the authority of Federal or State employment or Social Security acts.

33. Contracts. a. Under the provisions of these regulations the exchange officer is the contracting officer for the exchange, and he is authorized to execute a contract obligating the exchange.

b. All contracts and agreements to which exchanges are parties will contain when applicable the

statement that such contracts will be terminated when an exchange is liquidated or for other reasons at the option of the exchange.

c. Contracts on behalf of an exchange will not cover periods of more than 1 year without the approval of the commanding general of the service command.

d. Proposed concession contracts will be submitted to the commanding general of the service command for approval, as provided in paragraph 10c.

e. All contracts involving future performance will be reduced to writing, signed by the contracting parties, and filed in the records of the exchange.

f. All contracts that involve the use of Government property not under the control of the exchange will be submitted to the commanding general of the service command for approval.

g. Contracts involving the sale of 3.2 per cent beer entered into in connection with the provisions of paragraph 10b(7) of these regulations will, without exception, be accompanied by affidavit of the manufacturer and distributor of such beer certifying that the alcoholic content of such product does not exceed that permitted by these regulations.

h. (1) Exchange contracts are solely the obligation of the exchange. They are not Government contracts and the distinction between exchange contracts and Government contracts will be observed and clearly indicated at all times.

(2) Contracts for the erection of temporary exchange buildings will contain a statement that the

proposed construction is an exchange transaction and that the exchange alone is responsible for the debt, and not the Government.

i. When applicable, contracts for the erection of temporary buildings will contain a statement that immediately upon completion of the building, title thereto passes to the exchange. See paragraph 9c(5).

j. Notwithstanding the provisions of a above and paragraph 18i, whenever an exchange outside the continental limits of the United States makes purchases within the United States as provided in paragraph 12a(6) the fiscal officer appointed for such exchange is, within the scope of his assigned duties under such appointment, the contracting officer for the said exchange in limitation of the functions of the commanding officer and the exchange officer as set forth in a above and paragraph 16i.

34. Use of Government vehicles. The use of Government vehicles for exchanges may be authorized by the post commander or the commanding general of the service command in appropriate cases as provided in paragraph 7b(4) AR 850-15.

35. Loans. Funds for establishment, expansion, or other purposes in the operation of exchanges may be obtained by loan from Army Exchange Service. Exchanges will not borrow money from other sources except with permission of the Chief of Army Exchange Service.

Section IV

Miscellaneous

36. Posting of selling prices. Price lists will be posted conspicuously in all activities of exchanges, including those of concessionaires, and articles stocked for sale will be conspicuously priced.

37. Posting of financial statement. A copy of the current financial statement and a statement of operations will be exhibited in a conspicuous place in one of the rooms of the exchange during the ensuing accounting period.

38. Correspondence channels. Correspondence on matters pertaining to exchanges, originating from any exchange, will be forwarded to the commanding general of the service command for appropriate action. Where an expression of higher authority is mandatory or is desired prior to the taking of appropriate action, the commanding general of the service command will forward the matter,

together with his recommendations, to the Chief of Army Exchange Service for appropriate action.

39. Advice of finance officers. Locally available officers of the Finance Department may be consulted on the financial conduct of exchanges.

40. United States Attorney; services and advice of. An exchange officer is entitled to the legal advice or services of the local United States Attorney to protect the rights and interests of the exchange. (Ops. JAG, September 8, 1919). See AR 410-5. If the matter is not urgent, the views of the commanding general of the service command should be obtained before seeking such advice.

41. Penalty envelopes. Exchanges may use penalty envelopes only for proper correspondence pertaining to their business but not for the transmission of merchandise or solicitation of customers.

42. War Department communication system. Messages on exchange business may be transmitted without charge over telegraph, radio, and cable lines owned and operated by the War Department, the exchange being liable for charges on connecting lines.

43. Operation of canteens for civilian enemy aliens and prisoners of war. Notwithstanding the provisions of any other paragraph of these regulations, Army exchanges are authorized to operate canteens for interned civilian enemy aliens and prisoners of war. Such canteens will be operated in accordance with the regulations of the Provost Marshal General and such procedure not inconsistent therewith as may be prescribed from time to

time by agreement between Provost Marshal General and the Chief of the Army Exchange Service.

44. Publications using words "Army exchanges," etc. Exchange officers and exchange personnel will not be connected in any capacity with any publication published by a private individual, partnership, corporation, or association of any type using as or in its title or name the words "Army exchange," "Post exchange," or similar words by which it may be inferred that the publication is sponsored or approved by Army Exchange Service. No such publication will be circulated or distributed in any area under the jurisdiction of the War Department unless it has printed therein in a prominent place a statement as follows:

> This periodical is not published by nor is it an official publication of Army Exchange Service or of the War Department.
>
> (A. G. 331.36 (2-15-43)).

By order of the Secretary of War:

G. C. MARSHALL,
Chief of Staff.

Official:

J. A. ULIO,
Major General,
The Adjutant General.

Distribution:

A;E.

Sup. Ct. #2631.

Filed Nov. 20, 1946, at 11:42 o'clock a.m. Leoti V. Krone, Clerk, Supreme Court.

[Endorsed]: Filed July 6, 1944.

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

L. No. 17365

At Term In Law

THOMAS H. BRODHEAD,
d.b.a. T. H. Brodhead Co.,

Plaintiff,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector,

Defendant.

Action to Recover Gross Income Taxes
Paid Under Protest

DECISION

This in an action brought under the provisions of Section 1575, Revised Laws of Hawaii 1945 (formerly Section 571, Revised Laws of Hawaii 1935) to recover general excise taxes (sometimes called gross income taxes) assessed under the provisions of Act 141 (Ser. A-44) Session Laws of Hawaii 1935, as amended. Said tax law hereinafter is referred to as the General Excise Tax Law.

Plaintiff seeks to recover said taxes on the ground that the same were wrongfully and illegally demanded and collected, for the reason that of the amount of $695,062.72 claimed by defendant as the additional amount taxable at the rate of 1½%, $691,777.66 thereof represents sales to the United States post exchanges and ships' service stores, and the amount of $3,285.06 represents sales to the United

States or other instrumentalities, departments, or agencies of the United States, which [30] amounts were claimed to be exempt from gross income tax under the provisions of the General Excise Tax Law.

In the second place, it was claimed that the imposition of such taxes was in violation of Article I, Section 8, Clauses 12 and 13, and the Fifth Amendment of the Constitution of the United States, and of Section 55 of the Hawaiian Organic Act.

Finally, it was claimed that in no event can the gross income tax from sales to post exchanges and ships' service stores and other instrumentalities or agencies of the United States be taxed at more than ¼ of 1% when such sales to said agencies or instrumentalities are made for resale.

The case was tried jury waived before the Fifth Judge of this court, commencing July 6, 1944. Decision and judgment were rendered for the plaintiff and the defendant brought the case to the Supreme Court by writ of error. On March 4, 1946, the Supreme Court rendered its opinion reversing the judgment appealed from and directing that the cause be remanded for a new trial. A petition for rehearing was denied March 27, 1946.

In the Supreme Court this cause was consolidated for briefing and argument with Law. No. 16956, involving taxes paid during a period prior in time to the period involved in this case. Said action also was remanded for new trial, but the parties have stipulated that said Law No. 16956 may be held for trial awaiting the final disposition of this case.

The case again came on for trial jury waived on May 8, 1946. Most of the facts have been stipulated

by the parties. It further was stipulated that all of the evidence received upon the trial of Law. No. 16956 on June 16, 1943, should be deemed applicable to this case and considered with the same effect as if received in this case; this brings into the record in this case the testimony of Mortimer J. Glueck and Torkel Westly, and defendant's Exhibit 1, which is an advertisement entitled "Notice to Gross Income Taxpayers." Also made a part of the record by stipulation of the parties are Exhibit A, which is plaintiff's protest filed at the time of payment of the taxes which plaintiff seeks to recover, Exhibits B and C, which are copies of plaintiff's amended tax returns and the Tax Commissioner's assessments, and Exhibit D, a copy of the Post Exchange Regulations as revised March 19, 1943.

On the foregoing record the court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. Plaintiff is and at all times hereinafter mentioned was a resident of Honolulu, City and County of Honolulu, Territory of Hawaii; plaintiff is the general partner of a registered special partnership doing business in Honolulu aforesaid under the firm name and style of T. H. Brodhead Co. Said special partnership was organized on or about October 1, 1942, under and pursuant to Sections 6870 to 6892 inclusive of Chapter 225 of the Revised Laws of Hawaii 1935, and was in existence at the time of repeal of said sections by Act 162, Session Laws of Hawaii 1943.

2. Defendant is and was at all relevant times [32] the duly appointed, qualified and acting Tax Com-

missioner of the Territory of Hawaii, and as such is and was at all relevant times in charge of the administration and enforcement of Act 141 (Ser. A-44) of the Session Laws of Hawaii 1935, as amended from time to time, and with respect to any money representing a claim of the Territory for taxes pursuant to said General Excise Tax Law (hereafter referred to as gross income taxes) was a public accountant of the Territory within the meaning of Section 1575 of the Revised Laws of Hawaii 1945.

3. Plaintiff made monthly gross income tax returns for each of the months of October, 1942, to March, 1944, inclusive, and annual returns of gross income tax for each of the years 1942 and 1943, at the times required by law; plaintiff duly paid the gross income tax on the amounts of gross income reported in said returns as taxable, as and when the same was due and payable. On April 26, 1944, plaintiff, with the permission of the Tax Commissioner, filed amended returns covering the periods of October 1 to December 31, 1942, January 1 to December 31, 1943, and January, February and March, 1944.

4. On May 2, 1944, the Tax Commissioner issued first notices of proposed additional assessments of gross income taxes for the aforesaid periods, increasing the gross income taxable and the tax thereon, in the amount of $10,425.95.

5. On May 15, 1944, the plaintiff waived the necessity of a thirty day interval between the first and second notices of assessment, without prejudice to his claims, and the proposed additional assessments were made. [33] On the same day, May 15, 1944, plaintiff paid under protest the sum of $10,-

425.95 so assessed, a true copy of plaintiff's protest being annexed to the complaint as Exhibit A.

6. Plaintiff made sales to the United States government and its post exchanges and ships' service stores in the respective amounts and for the periods below set forth, and no gross income tax has been paid with respect thereto except the tax so paid under protest. Such sales were reported by plaintiff but the income therefrom was claimed to be exempt as derived from sales to the United States government and its post exchanges and ships' service stores; moreover, plaintiff classified the sales to the post exchanges and ships' service stores as "wholesaling." The following is a summary of the sales involved, showing the taxes assessed, and the claims made by the plaintiff.

Item No.	Amount of Gross Income and Period	Source*	Rate of Tax Assessed, and Amount of Tax Paid Under Protest	How Returned by Plaintiff
1.	$130,985.93 Oct.-Dec., '42	PX sales	1½% $1.964.79	Wholesaling; exemption claimed.
2.	$ 2,120.40 Oct.-Dec., '42	Sales to U.S.	1½% $ 31.81	Retailing; exemption claimed.
3.	$115,106.05 Jan.-April,'43	PX sales	1½% $1,726.59	Wholesaling; exemption claimed.
4.	$ 169.92 Jan.-April, '43	Sales to U.S.	1½% $ 2.55	Retailing; exemption claimed.
5.	$331,205.04 May-Dec., '43	PX sales	1½% $4,968.08	Wholesaling; exemption claimed.
6.	$ 270.75 May-Dec., '43	Sales to U.S.	1½% $ 4.06	Retailing; exemption claimed.
7.	$114,480.64 Jan.-Mar., '44	PX sales	1½% $1,717.21	Wholesaling; exemption claimed.
8.	$ 723.99 Jan.-Mar., '44	Sales to U.S.	1½% $ 10.86	Retailing; exemption claimed.

*PX refers to sales to post exchanges and ships' service stores.

7. The post exchanges to which reference is made in this decision are operated under army regulations, a copy of such regulations as revised March 19, 1943, being annexed to the stipulation of the parties as Exhibit D with the same effect as if admitted in evidence; it is hereby found that the army regulations in effect during the period involved in this case were the same in all material respects as said Exhibit D. Such post exchanges do not differ materially from the post exchanges involved in Standard Oil Co. v. Johnson, 316 U. S. 481, 86 L. Ed. 1611, June 1, 1942.

8. At no time did any of said post exchanges have a license under the General Excise Tax Law of the Territory, Act 141 (Ser. A-44) of the Session Laws of Hawaii 1935, as amended, and at no time did any of said post exchanges pay any tax under said law.

9. The ships' service stores, to which reference is made in this decision, have the same relation to the United States Navy as the post exchanges have to the United States Army and there is no material difference in the facts with respect to such ships' service stores.

10. Throughout the period involved in this case the gross proceeds of sales made to post exchanges and ships' service stores were assessed by the Tax Commissioner at the same rate of tax (1½%) as was applied by him upon the gross proceeds of sales to the War Department or Navy Department or other government departments, irrespective of what was done with the goods after purchase thereof; this likewise was the same rate of tax as was applied upon the gross income from construction contracts

made with the government, including the reimbursement of costs of a cost-plus contractor.

11. In instances in which sales are made to purchasers other than post exchanges and ships' service stores, classified by the Tax Commissioner as not subject to tax under the General Excise Tax Law, he has assessed the tax at the rate of 1½% (except when such rate was 1¼%), even though the goods were sold for resale by the purchaser. Such practice was followed throughout the period in question.

Conclusions of Law

A. The General Excise Tax Law of the Territory (Act 141 (Series A-44) Session Laws of Hawaii 1935, as amended) imposes a tax, and throughout the period in question did impose a tax, upon the business of selling tangible personal property in the Territory.

B. Throughout the period in question said tax applied to the plaintiff with respect to the business of selling tangible personal property, including all sales made to the United States government, its departments and agencies.

C. Section 3 of said law did not exempt the plaintiff from tax on the gross proceeds of the sales covered by finding number 6, made by him to the United States government and its post exchanges and ships' service stores.

D. The tax so imposed was and is a tax upon the plaintiff, and does not levy a burden upon or interfere with federal activities. [36]

E. Such tax has only an economic effect upon the United States government, its departments and agen-

cies. Such economic effect is indirect, and does not constitute the tax an invalid burden upon or interference with federal activities.

F. The imposition of said tax was and is within the power of the legislature of the Territory under Section 55 of the Hawaiian Organic Act, and not in violation of Article I, Section 8, Clause 12 or 13 or the Fifth Amendment of the Constitution of the United States.

G. The tax imposed by said General Excise Tax Law upon the business of selling, was and is measured by the gross proceeds of sales of the business. The rate of tax is and throughout the period was as follows:

> (1) Upon all gross proceeds of sales to the territorial and federal governments and agencies thereof, charitable institutions, hospitals, fraternal benefit socities, public utilities, users and consumers, and others not subject to general excise tax, 1½% (except during certain periods not involved in this case when such rate of tax was 1¼%) this 1½% rate being applicable irrespective of whether the goods were sold in wholesale lots or at wholesale prices, and irrespective of whether such goods were intended to be and were resold by the purchasers, or what was done with such goods.
>
> (2) Upon gross proceeds of sales to (a) a licensed retail merchant or jobber for purposes of [37] resale, (b) a licensed manufacturer for incorporation into a product for sale, (c) a

licensed contractor for incorporation into the project required by the contract: ¼ of 1%.

H. Said tax law required the Tax Commissioner to and he did include the sales in question with the sales in class (1) above.

I. Post exchanges and ships' service stores are not "merchants" within the meaning of the tax law; on the contrary they are arms of the federal government engaged in performing governmental functions as integral parts of the War Department.

J. Post exchanges and ships' service stores are not "licensed" within the meaning of the tax law, since not required to have and not having a license under section 21 of said tax law.

K. The classifications made by the legislature are natural and reasonable and not discriminatory against the plaintiff or the federal government or its instrumentalities, such classifications being based upon the difference between class (2) sales of goods, which in normal distribution through commercial channels bear two taxes (viz., one when sold at wholesale when the rate is ¼ of 1% and one when sold at retail when the rate is 1½%), and class (1) sales of goods which do not bear two taxes.

L. The Tax Commissioner applied the tax law in this case in conformity with the court's construction of said law, and hence there is no question of administrative discrimination involved in this case. [38]

M. The court hereby adopts as reasons for this decision the reasons stated in the opinion of the Supreme Court rendered March 4, 1946, and the opinion denying rehearing on March 27, 1946.

N. The plaintiff is not entitled to recover the money paid under protest, and the defendant is entitled to judgment dismissing the action.

Let judgment be entered accordingly.

Dated at Honolulu, T. H., this 15th day of May, 1946.

[Seal] /s/ A. M. CHRISTY,
Judge of the Above Entitled Court.

[Endorsed]: Filed May 15, 1946.

In the Circuit Court of the First Judicial District, Territory of Hawaii

L. No. 17365

At Term—In Law

THOMAS H. BRODHEAD, d.b.a. T. H. BRODHEAD CO.,

Plaintiff,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector,

Defendant.

Action To Recover Gross Income Taxes Paid Under Protest

JUDGMENT

The above-entitled cause having come on to be heard and the court having rendered its decision on the 15th day of May, 1946, in favor of the defendant, now therefore,

It Is Hereby Ordered, Adjudged and Decreed that the plaintiff take nothing by his complaint and that said action be and it hereby is dismissed.

Dated at Honolulu, T. H., this 15th day of May, 1946.

[Seal] /s/ WILLIAM C. ING,
Clerk of the Above Entitled Court.

Approved:
/s/ A. M. CRISTY,
Second Judge, First Circuit Court, Territory of Hawaii.

Approved as to Form:
SMITH, WILD, BEEBE & CADES.

By /s/ MILTON CADES,
Attorneys for the Plaintiff.

[Endorsed]: Filed May 15, 1946. [41]

[Title of Circuit Court and Cause.]

TRANSCRIPT

Of proceedings had on May 8th and 15th, 1946, before the Hon. A. M. Cristy, Circuit Judge.

Appearances:

For Plaintiff: Milton Cades, Esq., of the law firm of Smith, Wild, Beebe & Cades.

For Defendant: Miss Rhoda Lewis, Assistant Attorney General of the Territory of Hawaii. [42]

May 8, 1946—9:00 A.M.

Miss Lewis: If the Court please, I think it would clarify the record if it were mentioned that that Supreme Court opinion which was the opinion of March 4th, 1946, covered not only the case which I'm trying today but also Law No. 16956 covering an earlier period, but counsel have agreed to proceed with this case and let the other one stand meanwhile. Is that correct, Mr. Cades?

Mr. Cades: That is correct. It seemed simpler to proceed with the one case rather than two. In that connection, the order of consolidation was only for argument in the Supreme Court and it was not a consolidation of causes as such.

The Court: All right. So this concerns additional assessment for 1942, and is that all?

Mr. Cades: No, I believe it covers 1943 only; I don't believe it started with 1942, I believe it started in 1943.

The Court: Well, according to this file I have here in Law No. 17565—is that the one you're trying?

Miss Lewis: Yes.

Mr. Cades: It begins with October, 1942.

Miss Lewis: Yes, that's correct.

Mr. Cades: And continued through March, 1944.

The Court: Yes, according to the tables in paragraph four of the complaint.

Mr. Cades: That's correct, your Honor. Now, I believe it's fair to say that counsel are in agreement pretty much as to methods of shortening the trial, but we are confronted with certain practical problems as far as the record is concerned. The

case before was tried on stipulations which we would like to make a part of this record, together [43] with certain evidence and certain exhibits that were offered in connection with the evidence.

The Court: Well, now, let's identify the stipulations you refer to. In the record on page 20 of the court docket here I find a stipulation filed in open court July 6th, 1944.

Miss Lewis: That is dated June 24th, 1944.

The Court: Well, I just wanted to check up; on this it's dated June 24th, 1944. Is that one of the stipulations to which you refer?

Miss Lewis: Yes.

Mr. Cades: Yes, that's right, to which is attached tax return and copies of assessment notices and Army regulations.

The Court: Yes.

Mr. Cades: Now, then, counsel agree that that be offered in this case as a stipulation in this cause; is that correct?

Miss Lewis: That is correct; it was in this action and it is still in effect a stipulation for this new trial.

The Court: Let the record so show that the stipulation as on file here is part of this particular hearing, as part of the evidence.

Mr. Cades: Yes. Now, then, the next matter is the matter of the transcript of evidence that was adduced in the other case, being Law No. 16956; that we could get from the Supreme Court; that's the transcript of the evidence that was——

The Court (Interrupting): What's the number of the transcript?

Mr. Cades: Law No. 16956.

Miss Lewis: That is covered by paragraph eight of that stipulation. [44]

The Court: 16956?

Mr. Cades: That's right, your Honor.

The Court: Yes.

Mr. Cades: And that's in the record of the consolidated cases in the Supreme Court; I believe that we could obtain the original transcript from the Supreme Court and make that a part of this record.

The Court: Let's incorporate it by reference in the stipulation.

Miss Lewis: Yes.

Mr. Cades: That's correct.

Miss Lewis: Together with the exhibits.

Mr. Cades: Together with the exhibits referred to in the transcript. Is there any more?

Miss Lewis: I think we had one other matter we were willing to stipulate on that was as to the status of the plaintiff in this case, Thomas H. Brodhead, doing business as T. H. Brodhead Company. The record should show that counsel stipulate that T. H. Brodhead—or T. H. Brodhead Company, rather, is a special partnership organized on or about October 1st, 1942, which was in existence at the time Chapter 225 of the Revised Laws of Hawaii, 1935, was repealed by Act 162 of the Sessions Laws of 1943. In other words, it was a special partnership governed by the law before the uniform act. The question had come up when the

case was tried before as to Mr. Brodhead who was the general partner appearing to represent the whole partnership, and that was covered by the law governing this partnership, that we agreed and the record shall contain that stipulation.

The Court: That's agreeable to counsel?

Mr. Cades: Yes, that's agreeable. [45]

The Court: That is to say, the law as it was in the Revised Laws of 1935 as amended?

Miss Lewis: Yes.

Mr. Cades: The uniform partnership act which repealed the section on special partnerships had a saving provision to the effect that those that were previously registered would be governed under the old law.

The Court: Yes.

Mr. Cades: Does that dispose of everything that we had agreed on?

Miss Lewis: Yes, I think it does.

Mr. Cades: Now, then, at this time I would like to offer in evidence, or possibly some stipulation could be agreed on with regard to the tax primer. By way of introduction I might state that it is our contention—that among our contentions is one that the method of administering the laws from 1935 until 1942, without any amendment in the law, is of importance, and that it's also of importance in construing the meaning of the act itself to see how the taxing authorities administered it, how they understood the law from the time that it was first enacted. In other words, it's our belief that if a law is enacted which may be doubtful in its mean-

ing, the interpretation put on it by the persons charged with the administration of the act is of importance in determining the meaning of the act; of course it shows what they understood and what the public should have understood and what property the Legislature meant by the act at the time, particularly since they allowed that practice to continue. In that connection we wish to put in evidence the tax primer as evidence as to how the administrative officers acted. The tax primer itself is [46] dated July, 1935, and it is put out over the imprint of "Territory of Hawaii," with the request that any additional information can be obtained from the Honorable William Borthwick, Tax Commissioner.

Miss Lewis: I object to the introduction in evidence of the tax primer on the ground that it is incompetent, irrelevant and immaterial, and I would like to make my argument on that point if counsel has concluded with his offer.

The Court: Well, I think first the offer should be clarified or at least the objector should clarify the objection, one or the other, as to whether there is any question of the promulgation of the document, whether or not it has any competent factors or relevant bearing upon the issue as to the ultimate question; but I don't want any error in the record to appear from a careless treatment of identification of the document itself.

Mr. Cades: If you'll pardon me—it's probably my error, but I meant to state that I believe that counsel will stipulate as to the fact that Mr. Westly

would testify that this was issued by the Tax Commissioner, that it was issued for the purposes stated in the primer itself, and that it was distributed to the public for the purposes stated in the primer; and I just assumed that we would arrive at some such stipulation later in accordance with our prior conversation once the question of its administration, assuming that it comes from proper sources, is established.

The Court: Well, I think that perhaps you better identify it by a number so that the record indicates what you are talking about; call it Plaintiff's No. 1.

Mr. Cades: Well, I don't know what exhibit—we already have some exhibits—— [47]

Miss Lewis (Interrupting): We have a Defendant's Exhibit 1——

Mr. Cades: A, B, C, D, E, is it?

The Court: You mean those exhibits attached to the stipulation?

Mr. Cades: No; they're attached to the transcript; we have a record of those.

The Court: Well, suppose you number this "A-A?"

Mr. Cades: Yes, that would be——

Miss Lewis: Well, that is putting a number for identification only, is it not?

Mr. Cades: Yes.

The Court: Yes, identification No. AA refers to the so-called tax primer that counsel has been talking about. Now, do I understand, Miss Lewis, that to itself as a printed document you are or are not

ready to stipulate that the witness named by counsel would, if sworn and testifying, identify it as a document emanating from the Tax Office?

Miss Lewis: Yes, as a matter of foundation and subject to the objection as to the competency, relevancy and materiality, I'll stipulate that this pamphlet was prepared and caused to be printed by the Tax Commissioner and was distributed by the Tax Office. It, as it states, is not a compilation of any rules or regulations; as it states——

Mr. Cades (Interrupting): May I interrupt one moment; before you go into an argument can we finish with the stipulation as to what it is, as to what you agree that it is, and then we can argue about it. Of course there are a couple of other things that I'd like to enter into the stipulation as to what Mr. Westly would testify. [48]

The Court: Well, you might make that in the form of an offer of proof by Mr. Westly and see if Miss Lewis is willing to stipulate that if he were sworn and testified he would substantially support those facts.

Miss Lewis: I think I was not going into argument, Mr. Cades; I was going to read from the foreword to show that this pamphlet is. In other words, in my statement that this pamphlet was prepared and caused to be printed by the Tax Commissioner I had not covered the nature of the pamphlet; I wanted to cover that in the forword of the pamphlet itself. I think the record might well contain that statement which is in the foreword of the pamphlet as part of——

Mr. Cades (Interrupting): Well, I referred to that; I stated in my offer that it was inserted by the Tax Office for the purposes stated in the manual, or in the primer.

The Court: That is, your offer is inclusive of the qualifications, conditions, and so forth that the primer itself expresses?

Mr. Cades: Yes, that's correct.

Miss Lewis: Very well.

The Court: And in lieu of examining Mr. Westly on that you are willing to stipulate, Miss Lewis, that if called he would identify the pamphlet as emanating in that respect from the department?

Miss Lewis: Yes.

Mr. Cades: I would further like to prove by Mr. Westly that it was distributed to the general public beginning in 1935 and until some time around January, 1942, and that insofar as question and answer number 59 are concerned, contained in the primer, that no different information other than contained in that question and answer was [49] ever given to the public until the publication of the notice, being Defendant's Exhibit 1, which was approximately January 1st, 1942.

Miss Lewis: Well, that is correct as a statement of fact subject to the objection as to competency, relevancy or materiality.

The Court: I would make clear in the record that any and all questions as to admissibility, competency or relevancy of the testimony will await the conclusion of the identification of the document.

Mr. Cades: Well, that concludes my offer by

way of identification; and at this time I would like to offer in evidence Plaintiff's Exhibit A-A for Identification.

Miss Lewis: And I'll renew my objection on the ground of incompetency, immateriality and irrelevancy. The Supreme Court has held—that appears on page 4 of the advance sheet—that the gross income tax law expressed and intended—I'll quote from the Court, beginning with the words "an intent" I am quoting from the Court: "an intent clearly and unequivocally expressed." That intent, the Court made clear, was that this gross income tax should apply to sales or rather proceeds of sales to the United States and its departments and agencies if they were not actually beyond the taxing power of the Legislature. The Supreme Court having held that this tax law did express that intent without any ambiguity, it is not competent to receive any evidence as to administrative construction; that's everything relevant in any event only where there is an ambiguity in the law; citing Ewa Plantation Company vs. Wilder, 26 Hawaii, 299, at page 316; that case was affirmed in 289 Fed. 664. [50] In the second place, the record already shows that in fact tax was not collected on the proceeds of sales to the United States until January of 1942. This is offered as cumulative evidence of the same thing but has no value because there was no occasion to construe the law with respect to a specific legislative exemption not founded on constitutional immunity until the time of the King and Boozer case. In other words, counsel is offering this, as

I understand it, not merely to show that in fact the tax was not collected until January, 1942, on sales to the United States, but in an attempt to show that someone, administrative officials or legislative, put certain interpretation on the words of the law itself. Now, there was no occasion whatsoever to interpret the law as to whether it meant that there should be such exemption as a matter of legislative grant thereof even though it was within the taxing power of the Legislature, until it appeared clear that that taxing power existed. After the King and Boozer case as to that power was clarified the Tax Commissioner did commence collecting taxes. If he had continued his prior practice after that time there might be some shadow of argument that he did so on the theory that there was an express legislative exemption, and had the Legislature then met and remained silent there would be some shadow of argument that they approved that. On the contrary, however, when the issue as to the question of whether there was an express legislative exemption not founded on constitutional immunity arose, at that time the Tax Commissioner took the position that there was no such legislative grant; and not only that, but the next Legislature by its legislation showed that it knew of the Tax Commissioner's action [51] in taking that position and approved it; so that the subject matter offered has no materiality even if the law were ambiguous, which it is not. In the third place, any administrative action which occurred before January, 1942, is explained by the fact that the Panhandle Oil Company

case, which is referred to in the opinion of the Supreme Court, was then the law and had not yet been overruled, and it is of no value whatsoever, even if this exhibit would show it, that the Tax Office assumed that under the Panhandle Oil Company case it could not levy the tax. Such construction is of value only when it relates to a local law insofar as that was an opinion of administrative officials as to the Constitution of the United States or the Organic Act; that has no bearing. In the case of Biddle vs. Commissioner, 302 U. S. 373, 82 Law Ed. 431 at page 439, our Supreme Court has stated that administrative rulings made upon the intent of other legislative bodies, rather than the legislative body governing the official, are of no value whatsoever; those concerned an interpretation of British law. So, your Honor, there's nothing to be gained from any evidence as to what was thought about constitutional immunity during that period.

Finally, I take the position that this manual could never be of any value because it is merely a statement, of an informative character it is true, but issued with the express caution that it does not commit the Tax Office as to what it will do and that it is not a rule or regulation. I am quoting now from the foreword of this tax primer: "This preliminary manual of elementary information pertaining to the gross income tax Act is issued in advance of the rules and [52] regulations to be promulgated by the tax commission, with a view to meeting the urgent demands for explanations of the Act and of the application of the tax in transactions

of various kinds. This present manual is of a general nature and may be changed from time to time prior to the publication of the rules and regulations. It is not intended to take the place of rules and regulations, but rather to place in the hands of taxpayers, as quickly as possible, essential information in concise form for their guidance until rules and regulations can be prepared and published according to law."

Now, the authorities agree, in the case of Federal Internal Revenue Taxes, which is parallel, that a bulletin or office decision is not admissible as evidence of administrative construction because it is tinged with the warning that it has not the force and effect of law and that it would not commit the Department of Internal Revenue to any interpretation of the law, any more than the bulletin in this case. The Supreme Court has held, and also the Circuit Court of Appeals, that such interpretations, rulings and bulletins which are subject to that cautionary notice are not admissible in evidence to show administrative practice; Helvering vs. New York Trust Company, 292 U. S. 455; and to the same effect is Cole vs. Commissioner of Internal Revenue, 81 Fed. (2d) 485. Although that's an additional ground, I do think that the offer could be disposed of on the first ground alone, that the Court has ruled that the law has a certain meaning and that it is not ambiguous, and there is no occasion to admit evidence on the point.

Mr. Cades: It's my contention, if your Honor please, [53] that the tax primer is evidence of a

contemporaneous interpretation of the Act by the persons who are charged with its administration. As soon as the Act was passed by the 1935 Legislature it was to be carried into effect, I believe as of July 1st, 1935, by the Tax Commissioner; and this manual was promulgated with the idea of informing the public as to what was and was not taxable in certain instances. In connection with the item in question, question number 59, the question is very direct, under the heading "Sales Exempt From Taxation: Sales to Federal Government:" "59. Q. Are sales to the Federal Government or its agencies exempt from the tax? A. Yes. Such sales are specifically exempted in Section 3 of the Gross Income Tax Act." That's the information that was given to the public, and it was given to them for a period of 7 years during which time the Legislature met in 1937 and 1939, 1941, 1942 special session—1941 special session—there were four sessions of the Legislature during which the tax Act was administered in this manner. The Act contained its own delimiting provisions; it said that the exemption granted here shall continue until Congress shall permit the Territory to impose such a tax; and it is our contention that that administration had to continue until the limit of the taxing exemption had been reached. And it's our further contention there is nothing in the Supreme Court decisions, so far as I understand it—and I must confess that I don't completely understand it—there's nothing that I understand that would make this inadmissible in evidence.

Miss Lewis: In very brief reply, I won't again go into the proposition that the Supreme Court has said that the intent to impose a tax is clearly expressed; but taking up the question of the value of it even if there's an [54] ambiguity, it seems very clear that there is nothing in it to show the position taken that such sales were exempted even if the Constitution and Organic Act did not require that; in other words, the statement made here giving it the weight of a rule, which it was not— I don't stand on my objection on that ground—but taking it as it is, it's simply a statement that Section 3 had exempted such sales; well, on the assumption that they are associated, that there were constitutional immunities, it did; well, that assumption isn't worth anything if it was assumed that there were constitutional immunities, that isn't going to make one whit of difference because we get our law and constitutional immunity from the Supreme Court of the United States; it couldn't mean anything in that regard until it was understood that constitutional immunities did not exist; that about at the time of the King and Boozer case, at that time the Tax Office made it clear that it took the position that the law itself as a matter of legislative intent levied a tax and constitutional immunity did not exist; and in 1943, which was the first meeting of the Legislature after the issue had developed—no issue developed until that law as to constitutional immunity had been clarified—that 1943 Legislature in Act 81 of that session made it clear that they understood that the Tax Office was levying the Tax

on sales to the United States and accepted that as a correct basis for further legislation.

The Court: Well, as I understand the offer of proof as to the primer, it's that prior to the period on which this suit affected taxes the Tax Office had promulgated a different statement of their understanding of their duties.

Mr. Cades: That's correct. In other words, our [55] point is this, that from 1935 to January, 1942, the public was told that such sales were exempt, and that exemption grew out of the same Act. On January 1st, 1942, there were a series of advertisements published which stated that, commencing January 1st, income from sales to the United States previously exempt would be subject to tax. It's our contention that a tax does not spring out of a statute that has granted an exemption for approximately 7 years without some activating force that brings it into effect; that the force that could terminate the exemption is stated in the Act itself to be the permission of Congress to impose a tax; that no such Act of Congress was passed, and that the tax administrator could not on one day say it's exempt and the next day say it's not exempt without some legislation that gives the administrator that authority to impose the tax as of one day and not as of the previous day.

The Court: Well, from the Court's angle as to the admissibility, the Tax Office's regard of its area of duty under an Act which the Supreme Court now hands back to me as unambiguous and material and relevant, therefore the opinion promul-

gated and distributed by the Tax Office for the years prior to the years affected by this suit are clearly incompetent, irrelevant and immaterial to my mind and therefore the offer in evidence will be denied.

Mr. Cades: May I have an exception.

The Court: Exception allowed. The document itself should stay in the file as so identified. Now is there any more of this?

Mr. Cades: No, that concludes——

Miss Lewis (Interrupting): That concludes the evidence for the defendant also.

The Court: Oh, a question—— [56]

Miss Lewis (int.): I have prepared findings of fact and conclusions of law embodied in a decision, your Honor, on the basis of the Supreme Court's opinion, and I would move that this decision be entered and the judgment be rendered thereon for the defendant. I so move.

The Court: I have a question in that regard as to whether it's necessary from all angles to take the record and the transcript and exception that you make part of the record in this case, or whether it can be assumed that I'll gather the pertinent material from a discussion of the proposed findings.

Mr. Cades: Well, from my standpoint, in order to shorten the proceedings—which I think is all we're interested in—I don't see why a judgment cannot be entered in accordance with the decision of the Supreme Court without any conclusions of law; and as far as findings of fact are concerned it's a very short record; there's no character or reputation

evidence; there's nothing really that requires finding certain facts; most of these are copies of stipulated facts; there's very little else.

The Court: Have you seen the form of this, Mr. Cades?

Mr. Cades: I have, yes.

The Court: Well, is there any particular part of it that raises a particular issue of the court of record on this theory that the Supreme Court has crystalized in its opinion?

Mr. Cades: Well, the only thing is, your Honor, that there has been no finding to admit with regard to the evidence as to the prior period which of course my objection to the finding of any facts is that it's incompetent, because if the Court will not admit the tax primer obviously [57] it will not enter findings as to what the Tax Office did during the period 1935 to 1942.

The Court: Well, let's look at the beginning of page three, the first paragraph of findings of fact; is there any dispute as to that?

Mr. Cades: No, there isn't.

The Court: And paragraph two, any dispute as to that?

Mr. Cades: No.

The Court: Any as to paragraph three?

Mr. Cades: No.

The Court: And as to paragraph four?

Mr. Cades: No.

The Court: Paragraph five?

Mr. Cades: No.

The Court: Paragraph six?

Mr. Cades: I have not checked the figures, but subject to that check—that's taken right from the stipulation.

The Court: Subject to correction for omission or error on those figures?

Mr. Cades: That's right, it's correct.

The Court: There might be a typographical error.

Mr. Cades: Yes; we can compare that with the stipulation which is in the record.

The Court: Yes. Paragraph seven?

Mr. Cades: No objection.

The Court: Paragraph eight?

Mr. Cades: No objection.

The Court: Nine?

Mr. Cades: No objection.

The Court: Paragraph ten? [58]

Mr. Cades: No objection.

The Court: Paragraph eleven?

Mr. Cades: With regard to the language of it, with regard to it in general, the examples are what I object to in there; I have no objection to the general statement.

The Court: Well now, what part of it is it that you think is unnecessary?

Mr. Cades: Beginning with "for example," the rest of that sentence, beginning on the sixth line "for example."

Miss Lewis: As a statement of fact based on the evidence of Mr. Westly, that is correct though, isn't it, Mr. Cades?

Mr. Cades: No, it wasn't because there was some difference between the utility companies even; the Gas Company and the Electric Company were on different bases, and although the purchasers—what I mean by that is that the Electric Company, I believe it was, was divided into two parts; certain of their sales were exempt and yet the purchaser itself was subject to gross income tax, it may not have been with regard to particular sales; so that that in my opinion doesn't make it a correct statement.

The Court: Is there any necessity for that explanatory language in the findings?

Miss Lewis: Yes, I think it definitely is part of the record and should appear in a finding; and as to Mr. Gates' statement that is certainly a true summary of the evidence that it is covered here because what is mentioned is sales of stoves, refrigerators, heaters, and other goods to public utilities which resell but pay the public utilities tax in view of the general excise tax on the resale of such [59] goods; to the extent that they carry a line of goods which is not subject to public utilities tax the finding will not apply.

The Court: Well, what I have in mind, Miss Lewis, is the pertinent issue in this particular case, it's a tax on the sales to the Post Exchanges and Ships Service Stores included under that term, and this illustration material that you have here is really going out of the picture that we're concerned with, isn't it?

Miss Lewis: No, I think not, because it might be important for the record to show that the Post Ex-

changes were not the only such cases involved; that there were other similar cases and they were all treated the same. It might be thought otherwise that something had been done by design because the Post Exchanges alone would fall into the net; and I think it's important to show that there were other such situations in the course of normal practice and they were all treated the same.

The Court: Well, after you cover that so far as findings of fact need to cover it, the evidence itself would pick it up as to things detailed by the first 5½ lines: "In instances in which sales are made to purchasers other than post exchanges and ships' service stores, classified by the Tax Commissioner as not subject to tax under the General Excise Tax Law," and so on, even though he's assessed the tax, even though the goods were sold for resale.

Miss Lewis: I think it's important for the Court to find that there were other such instances besides sales to Post Exchanges.

The Court: The point I'm making is that if I'm going [60] to cite instances I've got to be careful that I cite them all or at least qualify the recitation so as to indicate clearly that I'm not citing them all.

Miss Lewis: Well, isn't that done by the words "for example?"

The Court: Not unless you've got some qualifying words.

Mr. Cades: Well, I might point out, for example, there's considerable doubt as to whether sales of food to schools classified for resale is an analogous instance, because the food in general in its character

in many instances, it isn't the same food that is resold necessarily; there may be an ambiguity by such findings that the Court finds that would be very similar to the resale of jewelry by ships' service stores, which I don't think the Court would like to do without some consideration.

The Court: Well, I don't frankly see the necessity of the Court attempting to illustrate unless the Court goes into the entire record and picks out of that record only those features that illustrate or clearly indicates by qualification that it's not attempting to be inclusive; and, secondly, that any raising of an example defeats the finding if the Appellate Court finds that the example is not well taken. I think that the matter that the 11th finding covers is sufficiently covered by putting a period after the word "purchaser" in the sixth line of the finding, and eliminate the balance of the paragraph.

Miss Lewis: Well, will the Court substitute for those words stricken out the following: "Sales to Post Exchanges were not the only instances of sales made to persons not subject to the General Excise Tax who intended to resell them?" [61]

The Court: Well, that's covered by the language even though the goods were sold for resale by the purchaser.

Miss Lewis: Well, there is a specific situation which I think should be covered by a finding of fact; the evidence does show definitely, this being findings of fact, as to what was done by the Tax Office; the record definitely shows that the Tax Office did as a

matter of administrative finding classify other sales besides sales to Post Exchanges as subject to tax at 1½%, on the ground that the purchaser was not subject to the General Excise Tax, and including other purchasers, who intended to resell.

Mr. Cades: I think that's all covered in that first sentence.

Miss Lewis: It's not if that does not include a finding that there were actually other instances besides the sales to Post Exchanges.

The Court: I would admit this possible clarification, that after the word "tax" on the fourth line where the third line comes down "he has assessed the tax," "in a non-discriminatory manner."

Mr. Cades: Well, I'm not sure that that is the evidence; I think it's a conclusion of law that could only arise out of a reading of the whole record.

The Court: Well, he has assessed the tax without apparent discrimination.

Mr. Cades: Well, I think as soon as you get into discrimination that's properly a question of law because discrimination is a word of law in tax matters.

The Court: Well, I'm covering the factual side; "without discrimination in fact." [62]

Mr. Cades: Well, I think that's very difficult to say without the record, and I don't think there is much evidence in the record.

The Court: Well, I think, to simplify the issue that I'm proceeding with here, the Court is willing to take the first 5½ lines just as they are here and eliminate the balance of that sentence and take the

last short sentence "Such practice was followed throughout the period in question."

Miss Lewis: Well, if the Court please, to make a finding of fact that there were other such instances there should be added to that statement "Such practice followed throughout the period in question"—and this would be the addition after "goods"—"and was applied with respect to sales to a number of persons, not Post Exchanges merely"; something of that character should be included.

The Court: Well, I think what you want here is more appropriately covered, if at all, in the opening words of—"In instances in which sales were made to purchasers other than Post Exchanges."

Mr. Cades: I think that would cover it.

The Court: See where I got that?

Miss Lewis: Yes.

The Court: "Other than Post Exchanges"; applied by the Tax Commissioner; that carries what you're after, I think, right straight into the conclusion.

Miss Lewis: Yes.

The Court: And then just leave the last sentence as it is: "That practice was followed throughout the period." That leaves it open to the details of the evidence record itself, and it doesn't jeopardize my findings as being inclusive of the wrong things and exclusive of the right things. [63]

Miss Lewis: Yes, I think that does cover it; and I thank you for it.

The Court: Now as to "Conclusions of Law."

Mr. Cades: Might I at this time request additional findings of fact?

The Court: Have you got them worked out?

Mr. Cades: I haven't but I could—I think I could recite them fairly approximately.

The Court: Well, the question in my mind, Mr. Cades, whether or not it wouldn't be more of value for you to tersely reduce them to writing and let Miss Lewis have a copy of that proposed addition so that we can have a session and hearing; she may agree to what you have as being a correct summary of the record, and if there is disagreement then thresh them out; wouldn't that be more logical?

Mr. Cades: Yes, I think probably it would; I could do that by some time this afternoon, and then if you have some time tomorrow morning; I don't think we would need much time.

The Court: Well, the only caution I have to give is that I don't want to rewrite the transcript in the decision.

Mr. Cades: Yes, I understand.

The Court: Well, so that I can be sure that I'll have time for you and that Miss Lewis will have time to go over your preparation, if you get your preparation over to her by either late this afternoon or first think tomorrow, then I can have a session on Friday morning; that fits in with my calendar better.

Mr. Cades: Friday at nine?

The Court: At nine o'clock, yes; that's the 10th.

That will give you a day to chew over the language together. [64]

Miss Lewis: All right.

The Court: And let me pass this original back to you; that page 7 will have to be modified anyway and it will be left open for any additional findings of fact that you may either agree to or the Court inserts.

Mr. Cades: Can we go on with conclusions of law now?

The Court: Yes; maybe we can clarify those.

Miss Lewis: Of course I may want to add something to that at the same time.

The Court: Paragraph "A" of Conclusions of Law.

Mr. Cades: No objection to number one—or "A".

The Court: And "B"; that's the Supreme Court's determination, isn't it?

Mr. Cades: That's right, yes, that's correct.

The Court: And "C"; that's also the Supreme Court's conclusion in its opinion?

Mr. Cades: Well, I'm not sure of that wording. I wonder, Miss Lewis, if you can point to that statement of the Court; I don't have the printed copy.

Miss Lewis: Well, it's there because they ordered judgment reversed, did they not; the Court held that with respect to the meaning of Section 3 of the Act it's not material.

The Court: Well, it says on the bottom of page 314 "whether or not the effect of the decision in the Panhandle case was to extend constitutional immunity under use of the language contained in Section 3 of the Act.....of the legislature." I think

the inference in that language is that the Supreme Court has thereby concluded the language in Section 3 is as granting an immunity, it's construed.

Mr. Cades: Well, I think that their statement should [65] be amended "that Section 3 of ..... during the period in question under the tax," in this case, because it certainly did exempt the sales to him in previous periods.

Miss Lewis: Well, if the Court please, obviously there's no ruling on anything that's not before the Court, the kind of language he injects in an issue that isn't before the Court at all.

The Court: Well, I think that that would be clarified by putting a comma at the end of that finding and the words "as applied to any of the issues of this case."

Miss Lewis: Well, wouldn't it be better to refer to the finding number six, "that Section 3 ..... of sales."

The Court: Covered by paragraph six of the findings of fact?

Miss Lewis: Yes; made by him.

The Court: Any language of that character will tie it expressly down to the case.

Miss Lewis: I'll modify finding six.

Mr. Cades: Yes; that will make it an accurate statement, "made by him."

Miss Lewis: Of sales covered by finding number six made by him to the United States Government and Post Exchanges.

The Court: That ties it down.

Mr. Cades: Yes, to this particular sale.

The Court: Now "D"?

Mr. Cades: No objection.

The Court: "E"?

Mr. Cades: No objection.

The Court: "F"?

Mr. Cades: No objection.

The Court: "G"? [66]

Mr. Cades: When I say "No objection" I mean as to the form of the language; I don't see the file.

The Court: I understand your objection to the result is inclusive and continues throughout; and the record should show counsel's reply to the Court in this matter is as to the form of the language and not as to the ultimate result on which he is taking an adverse position.

Mr. Cades: That is correct.

The Court: "G" is also within the direction——

Mr. Cades (int.): Well, "G-1", I don't think that that is quite true with regard to public utilities, and I think the language here would have to be tied up closer with the language of the Court that covers it.

Miss Lewis: Well, it is covered by the words "and others not subject to a second tax."

Mr. Cades: Where is that language?

The Court: That's the fifth line.

Mr. Cades: Yes, but I mean in the Court's decision because we know as a matter of practice that it isn't true, that there are a number of second and third instances of taxes of 1½%; of course if it were

made by the Court I couldn't object, but as a matter of fact I don't think it's correct.

Miss Lewis: I don't get the point there, Mr. Cades.

Mr. Cades: Well, it isn't true that in all instances where others are not subject to a second tax, 1½% is the tax that's paid; in other words, there are sales at one-quarter of one per cent where the merchandise is sold outside the Territory, and still the tax is one-quarter of one per cent, only, not 1½%; there are a number of instances where there is no second tax.

Miss Lewis: Why don't we say "—within the Territory?"

Mr. Cades: Well, there may be other exceptions there.

Miss Lewis: Well, I don't know what they are.

The Court: Well, after the word "others"—"and others in similar position subject to a second tax?"

Mr. Cades: Well, I don't think that is the test; it's others who are not licensed dealers, or something of the sort; it was better stated in the finding of fact; in other words, it's on sales to purchasers who are not subject to tax under the General Excise Tax, it isn't that they are not subject to a second tax, it's others not subject to the General Excise Tax Act.

Miss Lewis: All right; let's say "and others not subject to general excise tax."

The Court: Instead of the word "second."

Mr. Cades: Then we could strike out all about the rate.

Miss Lewis: What was that?

Mr. Cades: Oh, I see; no.

The Court: Any modification of sub-paragraph 2 under that "G"?

Mr. Cades: No.

Miss Lewis: Excuse me; we had one change we inserted under excise tax—; did we also insert "sales within the Territory?"

The Court: No; we left the language of the paragraph alone except by striking the word "second"; this is paragraph 1; striking the word "second" and putting in "general excise." Now paragraph "H".

Mr. Cades: That's all right.

The Court: Paragraph "I" [68]

Mr. Cades: That I don't think is quite right. I think that what the Court said was that they were not merchants; that's on the bottom.

The Court: You eliminate the word "retail?"

Mr. Cades: Yes.

Miss Lewis: Well, I think it's an immaterial thing.

The Court: Well, you can fix that up.

Mr. Cades: Well, it makes the error more apparent when you leave out "retail."

The Court: "J"? That's the majority opinion.

Mr. Cades: "J" is all right.

The Court: "K"; I think that's what the majority opinion plus the minority opinion both hold, binding upon this Court.

Mr. Cades: Well, I don't think the minority holds that.

The Court: Oh, no; the majority opinion does hold, and hereby its finding says it's discriminatory if it's 1½, it's not discriminatory at ¼.

Mr. Cades: Well, that's what this has reference to, clarifying between ¼ and 1½.

The Court: Yes, this is the ruling of the majority opinion.

Mr. Cades: Well, I was wondering if that was the language, that it was "natural and reasonable"; they held that it was not discriminatory.

The Court: Read that language toward the end there.

Mr. Cades: Yes, they do say that.

The Court: Any other modification of "K"?

Mr. Cades: No, that's all right. [69]

The Court: "L"?

Mr. Cades: No, no objection.

The Court: "M"?

Mr. Cades: Well, I'm not sure of "M." Is that anywhere in the opinion?

Miss Lewis: I think really the Court didn't go into that argument you made.

Mr. Cades: No, I don't think so either.

Miss Lewis: Apparently they didn't consider it necessary to do so.

Mr. Cades: Well, going back to "L"; did they go into "L"?

Miss Lewis: Well, that was in the decision disposing of the rehearing; it's very clear in there.

Mr. Cades: I see. Well, "L" I have no objection to. "M" I think goes further than four does.

Miss Lewis: Well, it's true they didn't go into that matter; if it isn't material, it isn't necessary to be in there.

The Court: I don't think it's necessary for me

to go there; let the Supreme Court clarify their own language.

Mr. Cades: And I can't object to "N" or to "O" either.

The Court: All right. Now, if you have in setting down suggested additional findings of fact that you think the Court should pass upon, and also while you're doing it it occurs to you that the Court should rule in the decision on any matters of law that I haven't covered by this language, draft those up and submit them to Miss Lewis, and what you can agree on, all right; if you can agree on them we'll have a conclusion on Friday morning. [70]

Miss Lewis: Well, I think the retyping might well be held, then, because it would be hard to finish all the pages.

The Court: Yes; you can't go beyond "Findings of Fact" in retyping until you get all the additional material.

Miss Lewis: Yes.

The Court: All right.

May 15, 1946, 2:10 P.M.

The Court: Preserving all exceptions and objections that the plaintiff has heretofore entered of record, the form of the decision I understand you have no new objections to it?

Mr. Cades: That's correct, not to the form.

The Court: So that the decision, with that one change of wording in the "nth" paragraph, you have no other matter to bring to my attention for change of wording?

Mr. Cades: That's correct. I'd like to note an exception to the decision on the ground that it's contrary to the law, the evidence and the weight of the evidence.

The Court: Exception may be noted.

Mr. Cades: At the same time I'd like to except to the entry of judgment on the grounds that the judgment is contrary to the law, the evidence and the weight of the evidence.

The Court: And inclusive of all objections made, reiterated during the progress of the trial and on the record.

Mr. Cades: Correct.

I Hereby Certify the foregoing to be a full and accurate transcript of my shorthand notes taken in the above entitled cause.

/s/ OLAF OSWALD,
Court Reporter.

[Endorsed]: Filed Aug. 10, 1946. [71]

In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii

L. No. 16956

THOMAS H. BRODHEAD,
Plaintiff,

vs.

WILLIAM BORTHWICK, Tax Commissioner and Tax Collector,
Defendant.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

The above-entitled matter came duly on for hearing before the Honorable John Albert Matthewman, a Judge of the above-entitled court, jury waived, on June 16, 1943, at 9 o'clock a.m.,

J. Russell Cades, Esq., and Milton Cades, Esq., of the firm of Messrs. Smith, Wild, Beebe & Cades, appearing for the plaintiff herein, and

J. Garner Anthony, Esq., Attorney General, and Miss Rhoda Lewis, Deputy Attorney General, appearing for the defendant herein,

Whereupon the following proceedings were had and testimony taken:

Mr. Milton Cades: Ready for the plaintiff, your Honor.

Miss Lewis: Ready for the defendant.

The Court: Proceed.

Mr. Milton Cades: This is an action to recover gross income taxes paid under protest. The parties have entered into a stipulation covering many of the

facts involved, and have reserved the right, first, to question the materiality of the [74] facts set forth, even though we have stipulated to the facts; we reserve the right to question the materiality of the facts, and we also reserve the right to produce evidence upon the trial. In connection with the stipulation, too, we have reserved the right to amend it in conformity with the original drafts, which were checked, and this final draft has not been, and if any errors are found the right is reserved to make those changes.

It is further desired, in connection with this matter,—there are a lot of figures set forth, and it is very difficult for almost anybody to make anything out of them except the parties who have lived with them for awhile, and we believe that if the issues are decided that the amounts involved can be agreed upon by the parties, so that we would request that the judgment,—or, rather, the opinion, need not necessarily include the amount of refund or the amount to be included in the judgment, but that that can be computed by the parties and included in the judgment.

The Court: Look at it this way: There is the complaint alleging facts. It is incumbent upon the plaintiff, naturally, to establish the fact. Now oftentimes that is done by stipulation; the other side agrees with the plaintiff that certain of the facts are true. That simplifies things greatly. We get rid of this and we get rid of that, and then we have left just the matters in issue. May we do that in this case?

Mr. Milton Cades: Yes, your Honor.

The Court: All of these,—there are quite a number of allegations, which undoubtedly you will consider it necessary to prove, to make up your case, according to the complaint. Now instead of putting the witnesses on the stand to go over [75] all of this, I am supposing from what you have just said that the other side has agreed with you that a large part of this is true, is that correct?

Mr. Milton Cades: That is correct, your Honor.

The Court: Then would it not induce toward a clarification to have you state now, paragraph by paragraph, what facts are admitted, and then the rest of it, only, you have to prove?

Mr. Milton Cades: Yes, that can be done, your Honor. May I at this time offer the stipulation, which has been agreed upon by the parties.

The Court: It may be received and filed.

Mr. Milton Cades: In connection with this stipulation there are some further facts which are agreed upon, which I would like to have made a part of the stipulation, and subject to the same terms.

The Court: Do you wish to do it this way? What you have there you have put in writing?

Mr. Milton Cades: Yes.

The Court: You might state now, for the record, these other facts as to which both sides agree, and they will be taken down.

Mr. Milton Cades: Yes, and if the court desires we can file a supplemental stipulation covering these facts.

The Court: If you care to, you can now state for the record what you stipulate.

Mr. Milton Cades: First, that purchases are made by post exchanges both on the mainland and locally according to the best judgment of the exchange officer.

The Court: May I interrupt you again, Mr. Cades. I do not know anything about this case. Would you preface whatever you have by giving me some idea as to the case. It is for the [76] refund of these income taxes paid under protest?

Mr. Milton Cades: That's right.

The Court: Are there several matters of issue? Are they issues of fact or are they issues of law? I would like, as soon as convenient to you, to learn what are the issues. Are they issues of fact or issues of law, or both?

Mr. Milton Cades: Yes, I will be glad to make a statement on that.

The plaintiff is Thomas H. Brodhead, who is a resident of Honolulu, and the defendant is William Borthwick, Tax Commissioner and Tax Collector. The plaintiff made monthly gross income tax payments for each of the months of January to September, 1942, and in his reports he showed varying amounts as his retail and wholesale sales, and made a note on the back of the returns to the effect that the tax paid on government sales is paid under protest, pending any court decision on the matter. The tax commissioner made an assessment of taxes, and made demand for the payment of additional taxes, and the taxpayer paid $2,631.10 under protest.

As the issues involved are all matters of law, we have agreed to the kind of sales that were made. We have stipulated as to the amount of sales of each class, and as to which sales are properly taxable and which sales are in question. The sales in question are, first, sales to the United States which are assessed at 1½ per cent., and those sales, we contend, —the plaintiff contends, are not properly taxable, because they are assessed in violation of the tax law and the Organic Act, and the Constitution of the United States. That is one of the issues involved.

Another issue is a purely technical issue of whether the assessment as a whole is not illegal, because it is made [77] upon the monthly returns or estimated of the taxpayer, and it is the plaintiff's contention that the assessment can only be based on the annual report and not on the monthly report.

And the third contention has to do with sales to post exchanges which are sales for resale. It is the plaintiff's contention that those sales cannot be taxed at more than ¼ of 1 per cent., even if they can be taxed at all. The argument there is, first, that the post exchanges are instrumentalities of the United States, and as such they fall within a class of all other sales to the United States. If the court finds that sales to the United States can be taxed, then we claim that they can only be taxed at ¼ of 1 per cent., and not at 1½ per cent., and that is based on our contention that a post exchange is greatly like any retail store, except that they are not required to have a gross income tax license, because

they are not required to be licensed, and we contend that they cannot be charged a higher rate of tax. That is, it is a discrimination against a United States agency and instrumentality, based upon an unreasonable classification.

All of the facts, or the vast majority of the facts in this case are agreed to, and the issues are chiefly issues of law.

The Court: But there are some issues of fact, I take it, are there?

Mr. Milton Cades: Well, I don't know of any. Frankly, I don't know of any issues of fact.

The Court: Well, then, how does this strike you? It is incumbent upon you to get before the court the facts contained in your complaint. You have done that entirely, now, by stipulation? [78]

Mr. Milton Cades: No, we still will require some evidence, your Honor.

Mr. Anthony: You haven't completed your stipulation, either, which you were about to read.

Mr. Milton Cades: Yes, that is true.

No, some of the facts will be supplied by this additional stipulation, and there will be some evidence.

The Court: Yes, I think I interrupted you, Mr. Cades.

Mr. Milton Cades: To get back to the stipulation, first; purchases are made by post exchanges both on the mainland and locally according to the best judgment of the exchange officer, the delivered cost to the exchange being one of the most important factors considered.

2. Goods purchased from the plaintiff were purchased for sale by the exchange to authorized per-

sons and organizations in accordance with paragraph 13 of the Regulations, which is Exhibit E, and such authorized persons and organizations bought such goods from the exchange for their own use or consumption and not for further sale.

3. The post exchanges operate stores, as authorized by paragraph 10 of the Regulations, Exhibit E, and with the exception of goods sold to authorized organizations the goods bought from the plaintiff were sold in such stores in small quantities to each purchaser.

Mr. Anthony: If the court please, at this time I would like to have the record perfectly clear that we join in this stipulation subject to our objection that we insist that this stipulation is immaterial, and we will argue that to the court at the appropriate time. This is on the same basis as our objection to the written stipulation, which contains a recital [79] of certain facts which we will also argue, although stipulated to, are immaterial to the issues of this cause. I wanted to make that clear to the court at the outset.

MORTIMER J. GLUECK

was duly called and sworn as a witness for the plaintiff herein, and testified as follows:

Direct Examination

By Mr. Milton Cades:

Q. What is your name, please?

(Testimony of Mortimer J. Glueck.)

A. Mortimer J. Glueck.

Q. And what is your occupation?

A. I am a food broker, and also I have acted as an accountant for several firms.

Q. During the period January 1st, 1942, to September 30, 1942, were you the accountant of Thomas H. Brodhead? A. I was.

Q. And in that connection were you familiar with the business of Thomas H. Brodhead?

A. Yes.

Q. Were you familiar with the kind of business he did? A. Yes.

Q. And the organization of his business?

A. Yes.

Q. What was his business?

A. His business was principally supplying so-called ships' service or post exchange needs to both the Army and the Navy. That forms the greatest part of his business. That includes such items as candy, toilet articles and razors, fruit juices, and anything of that nature, belts, emblems; anything like that, that post exchanges or the ship's service stores might require [80] for resale to their men.

Q. Did he have any other customers?

A. He did, yes.

Q. What was the nature of the sales; were they large quantities or small quantities?

A. His other business, the rest of his business, was principally wholesale business.

Q. Principally wholesale business? A. Yes.

(Testimony of Mortimer J. Glueck.)

Q. And was he generally known in the trade as a wholesaler?

A. Yes, very definitely. He maintains a warehouse. He has an office force, and he has trucks and salesmen, so he forms a wholesaler in the general meaning of the term in the trade.

Q. And he sells to retailers and jobbers?

A. He sells to retailers and jobbers, yes.

Mr. Anthony: No questions on cross-examination.

(Witness excused.)

Miss Lewis: I would like to make a statement of the issues from our standpoint, your Honor.

The Court: Proceed.

Miss Lewis: The issues have been stated by the plaintiff, and I would like to make an additional statement, of additional issues, from the standpoint of the defendant. It is true that there is involved in the case the question of the taxation of the plaintiff on his gross income from sales to the United States and instrumentalities of the United States, but the defendant contends that arises only with respect to sales the gross income from which was included in the returns from July to September of 1942. The figures which are contained in this stipulation divide these into two periods. During the [81] period from January to June, 1942, the plaintiff was paying his taxes at the time when he was filing his returns, and although he made a notation on the back of each return that he was protesting pending court determination of government sales

taxability, actually he did not follow up that informal and brief protest by suing to recover the money so paid, within the required 30-day period. The statute, Section 571, R. 1935, under which the plaintiff is suing the tax commissioner, who represents the Territory, as we contend, requires that it be filed within a 30-day period. The reason for that is that the money is kept in a special fund to await the judgment of the court, if the suit is filed within the thirty-day period, and if it is not impounded there is no amount to meet the judgment, if the court so found, and we contend that the tax commissioner, representing the Territory, cannot be sued at this time. That perhaps could be better brought out in our argument, but I wanted to divide this period into two periods, because the plaintiff did not mention that fact.

With respect to the sales to the post exchanges, we share in plaintiff's desire that his objection to the rate of tax should be determined, assuming that the sale is taxable, as we contend that it was, but we feel it necessary to point out to the court that there is a subsidiary point, and that is whether the plaintiff is in any position to complain of that rate. He himself in his return did classify the income from those sales to the post exchanges as retailing, which means it is taxable at 1½ per cent., if taxable, and he did claim the exemption, but he did show this income in the "retailing" column, and now he comes into court and says the money was illegally extracted from him, the only ground being [82] that it was not retailing but wholesaling, and

we feel that if the court should consider that the plaintiff's objection to the rate of tax has some merit, the court should further consider whether he is in a position to advance that point. So that is an additional point that the plaintiff did not mention.

There is a question, too, in the matter of cost, as prayed for in the complaint; the costs and interest, which is not in conformity with a suit against the Territory, which we are prepared to show is the proper way to consider this case. That is a very small issue, but one that was not mentioned by the plaintiff.

The Court: Are we proceeding under the assumption that the plaintiff's case is in?

Mr. Milton Cades: Before I rested I did want to make these reservations, that, as a part of my case, I did want to question Mr. Westly, but I am informed that the defendant is going to call him, and he has consented to my questioning Mr. Westly as if he were testifying as a part of the opening. That is, I will not be limited in the course of my cross-examination to the matters which he has been questioned on.

With that statement, we rest.

The Court: Let's follow this as regularly as you can. Do you have another witness now?

Mr. Milton Cades: I was going to call Mr. Westly as a part of my case.

The Court: Do you, or don't you? Let's take it regularly.

Mr. Milton Cades: Yes, I will call him.

TORKEL WESTLY

was duly called and sworn as a witness for the plaintiff, and testified as follows: [83]

Direct Examination

By Mr. Cades:

Q. State your name, please.

A. Torkel Westly.

Q. And you are the deputy tax commissioner in charge of gross income taxes? A. Yes.

Q. And what was your position before that?

A. Deputy tax commissioner in charge of field examination.

Q. And how long did you hold that position?

A. From August, 1937, to June, 1943.

Q. And how long have you been in the tax office, the Territorial tax office?

A. Since July 1st, 1935.

Q. In the course of your employment were you familiar with the administrative practice in connection with the assessment of gross income taxes and collection thereof? A. I believe I was.

Q. And with regard to sales to the United States, what was the practice of the Territory prior to January 1st, 1942?

A. Prior to January 1st, 1942, we considered sales to the Federal government as exempt.

Q. (By the Court): As what?

A. As exempt from the gross income tax.

Q. No gross income tax was assessed during that period prior to January 1, 1942, on account of sales to the United States, is that correct?

(Testimony of Torkel Westly.)

A. As we understood it at the time.

Q. Well, in the practice, you understood that such sales were exempt and you did not assess or assume to collect any taxes on account of such sales? [84]

Mr. Anthony: Just a minute. That is asking this witness a question with regard to what he understood. It is all right for him to tell what he did, but what his understanding of the law is, even the Supreme Court of the United States had to change its mind; that is why we are here; that is the question, your Honor.

The Court: Even on the view that it was permissible to go into what was done, is that really of some importance here? Is that important, what they had done with regard to cases of that sort? If so, why? No objection was made, but the thought comes into my mind on that question: Why is that helpful, what they had done?

Mr. Milton Cades: Because, if your Honor please, it appears that after January 1, 1942, there was a change made in the administrative practice, and the reason for it, I believe, is material in determining this case. In other words, beginning January 1st, 1942, the Territory attempted to collect and to assess taxes which had previously not been taxable, and in the absence of any change in the statute, we believe that that was an improper change in administrative practice.

The Court: This matter of administrative practice brings to mind the case in the Hawaiian courts

(Testimony of Torkel Westly.)

in the appeal of James A. Thompson. Maybe you gentlemen will recall it; a case that occurred while I was in the position Mr. Anthony now holds. In short, the Supreme Court held, with respect to the printing of Hawaiian Reports, which had heretofore been in the name of the clerk of the Supreme Court, and that although the Supreme Court itself had sanctioned that practice for 14 years, it made no difference whatever; that the contracts were void unless in the name of the Territory of Hawaii; that administrative practice counted for nothing, [85] when the law was otherwise. That is, these reports had been for 14 years been printed in the name of the publishing company and in Henry Smith's or James A. Thompson's, clerk of the Supreme Court —and the matter finally came up for a test, and the Supreme Court ruled on the test that it made no difference in the slightest what the practice had been, the law was just the same. Is that relevant to this matter?

Mr. Milton Cades: Well, in my opinion, yes.

The Court: Are you familiar with that case?

Mr. Milton Cades: Well, I have in mind a United States Supreme Court case where exactly that was in effect; it had to do with taxation under a Massachusetts statute of the proceeds of municipal bonds, and the Supreme Court of Massachusetts had held that the proceeds of those municipal bonds were not taxable, and upon a change being made the Supreme Court of the United States said, well, it was quite obvious that that change was directed

(Testimony of Torkel Westly.)

directly against the proceeds of those bonds, and indicates a discrimination directly against them.

The Court: Well, proceed.

Q. Mr. Westly, prior to 1942 did you assess for gross income tax and attempt to collect on account of the proceeds of sales to the United States?

A. Well, as I said before there is an exception. The sales to post exchanges, we did collect a tax from sales to post exchanges, which have since been held to be instrumentalities of the Federal government.

Q. Do I understand that before 1942 the only sales to the United States that were assessed for tax were sales to post exchanges?

A. Sales to post exchanges and ships' service stores. [86]

Q. Yes.

A. (Continuing): Where it is taxable, we considered them taxable, and we received a tax on sales to those organization prior to January 1st, 1942.

Q. And at what rate were they assessed?

A. One-quarter of one per cent.

Q. At one-quarter of one per cent?

A. Yes.

Q. But sales to the United States direct; that is, to the Army or Navy, or any other agency or instrumentality, except post exchanges and ships' service stores, were not assessed at all prior to January 1st, 1942?

A. That is correct. Of course there is an excep-

(Testimony of Torkel Westly.)

tion to that, too. We did tax contracts with the Federal government.

Q. That is, the proceeds of contracts?

A. With the United States.

Q. When you say "contracts" do you mean sales and purchase contracts, or just construction contracts?

A. I am referring to construction contracts only.

Q. It was only the proceeds of construction contracts that were taxed prior to January 1, 1942?

A. Yes, that's right.

Q. All other contracts of sales or purchases, or of other sales, were not assessed, except sales to post exchanges, which were assessed at one-quarter of one per cent? A. That is correct.

Q. And the proceeds of construction contracts were taxed at what rate?

A. At one and one-half per cent, or one and one-quarter per cent, whichever rate was applicable.

Q. At one and one-quarter per cent, and then at one an one-half, when that rate became applicable?

A. Yes.

Q. On January 1st, 1942, what was the basis of the change?

A. You mean, why did we change it?

Q. Yes, why did you change it?

A. We changed it after receiving an opinion from the Attorney General to the effect that such sales could be taxed.

Q. And is that the reason also for increasing

(Testimony of Torkel Westly.)

the rate on sales to post exchanges and ships' service stores? A. Yes, directly, it was.

Q. That, too, was done because of an opinion of the attorney general?

A. Well, it refers to the same opinion. The opinion did not specifically mention post exchanges; it said "sales to the Federal government or its instrumentalities."

Q. During the period prior to January, 1942, the retail rate was 1¼ or 1½ per cent?

A. It was 1½ in 1941.

Q. In 1941. And when did that rate change from 1¼?

A. It changed, as I remember it, July 1st, 1939.

Q. When you talk of the 1½ per cent tax, that means since July 1st, 1939?

A. That is correct.

Q. And the applicable rate for the prior period was 1¼?

A. Yes, and for six months it was one per cent, back in 1937; the rate changes occasionally.

Q. And that is ordinarily called the retail rate?

A. That is the retail tax rate.

Q. Now during the period referred to, all retailers—that is, all persons who sold, not for resale, were taxed at the rate of 1½ per cent prior to January 1, 1942?

A. Well, there were others that were taxed at the same rate, even though the goods were resold.

Q. Yes.

(Testimony of Torkel Westly.)

A. The question was not whether it was for resale or not.

Q. That was not the question?

A. Not always.

Q. What was the question?

A. Well, for example a sale to an exempted institution for resale would be taxed at the retail rate. What I want to say is that "for resale" is not controlling, and has no direct bearing in determining whether the sale is taxable at the retail or wholesale rate.

Q. Well, all persons who sell for resale, and then resold, on their sales were taxed at 1½ per cent, is that right?

A. You mean all persons who purchased for resale were taxed at 1½ per cent?

Q. Yes.

A. They were, if they were subject to the tax.

Q. That is prior to January 1, 1942, and the same is true after?

A. The same is true after; if they are subject to the tax, they are taxed at 1½.

Q. Well, to go back to that prior period; prior to January 1, 1942, all sales made to persons who resold were subject to a tax of ¼ of 1 per cent?

A. Not necessarily; there are exceptions to that rule.

Q. What were the exceptions?

A. The exception is as I said, a sale to an exempt institution.

Q. They did not resell?

(Testimony of Torkel Westly.)

A. Take a sale to a hospital; they may resell, or take a [89] sale to a school cafeteria, they resold, or any sale to a public cafeteria where they resell, but in such a case the sale is not to a licensed dealer, and not tax is paid on the resale.

Q. How about retailers, what were they taxed at; sales to retailers?

A. The sales to retailers, those who paid the tax on the resale, were taxed at one-quarter of one per cent, to the wholesalers.

Q. And were there any retailers who were not licensed, and the sales to whom were not taxed at the wholesale rate? A. I don't get that.

Q. Were there any retailers who were unlicensed prior to January 1, 1942?

Mr. Anthony: Do you mean retailers in the statutory sense or retailers generally?

Mr. Milton Cades: As he has been using the term.

A. There might have been some retailers that did not take out a license; if we knew about it we would see that they had a license.

Q. Yes, but do you remember in any instance taxing a person who sold to a retailer at the retail rate because the retailer was not licensed?

A. Not merely because the retailer was not licensed. If he was required to take out a license we we would say that he was licensed, and we would allow the wholesaler the wholesale rate for such sales.

Q. So that it did not depend on whether the re-

(Testimony of Torkel Westly.)

tailer actually was licensed or not; it was dependent on whether he was required to take a license or not?

A. Yes, generally speaking, I think so. The tax commissioner [90] would give the taxpayer the benefit. If he sold to a person who should be a licensed retailer he would be allowed a quarter of one per cent. We would not penalize them just because the man did not take out a license and pay the tax as a retailer.

Q. Then do I take it that the reason that prior to January 1st, 1942, sales were taxed at ¼ of 1 per cent to post exchanges was because you believed they were required to take out a license; that is, post exchanges and ships' service stores were required to take out a license?

A. The ruling, and an agreement was made back in 1935 when the attorney general issued a ruling to the effect that post exchanges were not instrumentalities of the Federal government, and the taxpayers agreed to pay ¼ of 1 per cent on those sales, and the tax commissioner agreed to accept such tax.

Q. On January 1, 1942, was the rate increased because a determination had been made that post exchanges were not required to take out licenses?

A. No, the rate was increased because it was considered to be a sale to an instrumentality of the Federal government.

Q. Assume that the sale had not been made to an instrumentality of the United States, the tax would have been one-quarter of one per cent?

A. Well, it depends on to whom it was sold. As

(Testimony of Torkel Westly.)

I said before, if the sale was to a public utility it would not be a ¼ of one per cent; if it was to a school cafeteria it would not be ¼ of one per cent, but if the sale was to a licensed retailer who paid the tax, we would allow the one-quarter of one per cent to the wholesaler.

Q. Well, when you say "when it is made to a licensed retailer" you mean if it was made to a retailer who was required to take a license? It does not mean that he actually has a license; [91] it means that he is required to have it? Isn't that what you intend from your testimony?

A. Well, as I stated before, there are exceptions to the general rule, but if the buyer is required to have a license and should be licensed we will see that he is licensed, and if he is licensed and paying a tax we will allow one-quarter of one per cent to the wholesaler.

Q. But won't you also allow it if he is required to take a license and has not done it as yet?

A. Yes, I believe we would.

Q. So that is the only reason—— (interrupted.)

A. There are, of course, exceptions to the rule. If it is the fault of the seller that we did not license the buyer, then we may be more technical about it, and hold that the sale was not to a licensed retailer and as such we could not allow the ½ of 1 per cent.

Q. But if it is not the fault of the seller, and if the buyer is required to have a license, whether or not he does have it, the seller would be taxed at the rate of ½ of 1 per cent? A. Yes.

(Testimony of Torkel Westly.)

Q. The increase therefore was made on January 1st, 1942, because as of that date it was determined that the post exchanges were not required to have a license?

A. As instrumentalities of the Federal government they would not be required to have a license.

Q. Yes, they were not required to have a license, and therefore the rate was increased from ¼ to 1½% per cent?

A. Not merely because of the license issue; because it was a sale to the Federal government; an instrumentality of the Federal government.

Q. In other words, are all sales to an instrumentality of the [92] United States taxable at 1½ per cent?

A. At the retail rate, beginning January 1st, 1942.

Q. And that is regardless of the purposes for which an agency or instrumentality of the United States purchases his goods? A. Yes.

Q. And that is regardless of the nature of the organization; of the nature or composition of the particular agency or instrumentality?

A. Yes, that is correct.

Q. And it does not matter what the instrumentality or agency does with the good after it purchases them?

A. No, it would not make any difference.

Q. And it does not matter whether they resell for consumption or use of the purchaser?

A. Absolutely immaterial.

(Testimony of Torkel Westly.)

Q. And it does not matter whether the agency or instrumentality uses it themselves?

A. That is absolutely immaterial.

Q. Now what you have testified to is what has been done by your office as a matter of administration of the tax? A. That is right.

Cross-Examination

By Mr. Anthony:

Q. Mr. Westly, I notice that the title of this case is Thomas H. Brodhead versus William Borthwick?

A. Yes.

Q. Brodhead is the taxpayer?

A. He is the taxpayer.

Q. He is an individual doing business here in the Territory? A. He is. [93]

Q. And he sells goods to various people including the post exchange? A. He does.

Q. And the administration practice that you have described is that such a transaction under the gross income tax law that is taxable?

A. It is.

Q. And on what rate?

A. It depends on to whom the sale was made to; whether it was made prior to January 1st or after January 1st, 1942.

Q. Let's take one step at a time. In January—subsequent to January 1, 1942, you received an opinion of the attorney general in regard to this statute, did you not? A. I did.

Q. And pursuant to that opinion you changed

(Testimony of Torkel Westly.)

your administrative practice in regard to the statute? A. We did.

Q. And when was that change made?

A. It was made as of January 1st, 1942.

Q. Did it affect contracts that had been entered into prior to January 1, 1942, but not to be performed until after January 1st, 1942?

A. No. We did exempt such contracts. Sales made on contracts entered into prior to January 1, 1942, to a very considerable extent, were exempt.

Q. Now these institutions which you have referred to as exempt will you please enumerate those.

A. You mean the public utilities?

Q. Yes, and the schools; with a brief description as to what they do. [94]

A. The public utilities are exempt from the gross income tax if that income is subject to the public utility tax.

Q. You take one public utility, for instance like the Honolulu Gas Company, they conduct quite a general retail business, in the general sense, do they not? A. Yes.

Q. It sells gas stoves, ranges and refrigerators and heaters and what not?

A. That is correct.

Q. And that concern pays a tax at what rate?

A. The Honolulu Gas Company does not pay any gross income tax.

Q. How about the sale of those goods?

A. The retail sales are included in the public utility tax. They pay a five per cent minimum pub-

(Testimony of Torkel Westly.)

lic utility tax on all of the gross income from the public utility business, which includes the retailing of stoves and ice boxes and so forth.

Q. Take another classification such as schools and hospitals, and charitable institutions; how are they treated?

A. They are tax exempt; they are exempt from the gross income tax, and sales to them are taxed at the retail rate to the seller.

Q. In other words, your treatment of Mr. Brodhead here is the same as you treat a person that sells to a charitable institution, is that right?

A. Exactly.

Q. And there is no discrimination between the firms? A. No discrimination of any kind.

Q. And it is the same as you would treat the seller who sells to a school cafeteria?

A. That is correct. [95]

Q. Are there some other classifications that are in that same category?

A. I cannot recollect.

Q. Well, what about sales to fraternaal societies; benefit societies?

A. Oh, sales to benefit societies.

Q. Charitable corporations?

A. Yes. It depends on whether they are licensed under the gross income act; whether they are in business or not.

Q. Yes, but if they are a non-profit organization they would not be taxable under the gross income tax, would they?

(Testimony of Torkel Westly.)

A. That's right, and the tax paid, they would be taxed as a retail sale.

Q. That is, at 1½ per cent?

A. Yes, as a retail sale, at 1½ per cent.

Q. So you treat these activities on the same basis, do you not? A. Yes, that's right.

Q. Including the post exchanges?

A. Including the post exchanges.

Q. Now, suppose there is a sale to a public utility by a local taxpayer, what would that local taxpayer pay on his sale to the public utility?

A. He would pay 1½ per cent if the public utility was subject to the utility tax on the resale.

Q. Suppose the particular item involved was an item which the public utility sold at retail in its store, would it still be 1½ per cent?

A. The seller would still pay 1½ per cent if that sale was subject to the public utility tax.

Q. Now you have mentioned the Honolulu Gas Company. What is [96] the practice with respect to the Hawaiian Electric Company? e

A. Well, the Honolulu Gas Company is 100 per cent; pays utility taxes on a 100 per cent basis, and the Hawaiian Electric is both utility and a non-utility business.

Q. Well, directing your attention to the utility end?

A. Well, in sales to the Hawaiian Electric which is included in the public utility business, whether it is resale—retail or wholesale, it is taxed to the seller at the retail rate.

(Testimony of Torkel Westly.)

Q. Of 1½ per cent?

A. At 1½ per cent, yes, because it is not for resale by the utility under the gross income act.

Q. In administering this law you are of course bound by the definition of what is a retailer and what is a wholesaler as defined in this statute?

A. That's right.

Q. What publicity did you give to the change of this administrative ruling in connection with this law, Mr. Westly?

A. We published one notice in the Honolulu Star-Bulletin for ten days, and another in the Advertiser—another one in the Honolulu Advertiser for ten days. The first date was December 31, 1941, and it ran consecutively for ten days.

Q. Is this a copy of the notice which you caused to have published in the Honolulu Star-Bulletin?

A. It is.

Mr. Anthony: We offer this in evidence, if the Court please.

The Court: Any objection.

Mr. Milton Cades: No objection.

The Court: It may be received and marked Defendant's Exhibit 1. [97]

The document offered in evidence is received and marked: Defendant's Exhibit 1.

(Testimony of Torkel Westley.)

DEFENDANT'S EXHIBIT No. 1

Notice to Gross Income Taxpayers

Effective January 2, 1942, All sales of tangible property made to the United States and/or its instrumentalities, departments or agencies (heretofore exempt), Must be included in the measure of the Gross Income Tax and Must be returned for taxable purposes under the Gross Income Tax Law of Hawaii. The foregoing shall not be construed as exempting sales of services or income derived from rents received from the United States and/or instrumentalities, departments or agencies prior to January 1, 1942.

All said sales as included in the measure of the tax shall be computed at the 1½% rate, except in the case where a sale is made to a person (by "Person" is meant all entities coming within the meaning of said term as defined by the Gross Income Tax Law of Hawaii), reselling to the United States and/or its instrumentalities and/or its agencies. In cases of this nature, the first seller shall compute his taxable income at the ¼ of 1% rate, and the second seller (person selling to the United States and/or its instrumentalities and/or its agencies), shall compute his taxable income at the 1½% rate.

Any person claiming that his gross income is taxable at the ¼ of 1% rate shall submit sufficient proof, as may be deemed necessary by this Depart-

(Testimony of Torkel Westly.)

ment, substantiating his claim to said rate of ¼ of 1%.

WM. BORTHWICK,
Tax Commissioner,
Territory of Hawaii.

FRANK ROSEHILL,
Deputy Tax Commissioner, Bureau of Gross Income and Consumption Taxes.

To: Honolulu Star-Bulletin, 10 days beg. Dec. 31, 1941.

To: Honolulu Advertiser, 10 days beg. Jan. 1, 1942.

[Notice of Publication of Notice to Gross Income Taxpayers published in Honolulu Star-Bulletin Dec. 31, 1941; Jan. 1, 2, 3, 5, 6, 7, 8, 9, 10, 1942; and Honolulu Advertiser Jan. 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 1942, attached.]

Filed C. C., June 16, 1943, R. P. Whitmarsh, Clerk
[Endorsed]: Filed Nov. 20, 1946.

Q. The opinion that you received from the attorney general which caused you to change the administrative practice in regard to this act was received prior to January 1, 1942, was it not?

A. It was.

Q. Mr. Westly, you testified, I believe, in regard

(Testimony of Torkel Westly.)

to the collection of the gross income tax from the Contractors? A. Yes.

Q. You refer to the P.N.A.B. Contractors, out here at Pearl Harbor? A. Yes, and others.

Q. That was the subject matter of a rather extensive litigation in the Federal Court, was it not? A. That is correct.

Q. And the conclusion of that litigation, the tax was paid on a compromise judgment, is that correct?

Mr. Russell Cades: I object to that, your Honor. The examination has only been as to the administrative practice, and has nothing to do with the particular case, otherwise we will go into collateral issues that will take a long time, and I object to this line of cross-examination; he is limited to the matter brought out on direct examination, and he has gone to great lengths, your Honor, to find out whether there is discrimination; we object to going into an independent inquiry on an utterly immaterial matter.

Mr. Anthony: This is touched on, on direct examination, and is also referred to in the stipulation. I don't care to pursue it any further, but this is just in line with the reason why the tax office made a change in their administrative practice. [98]

A. Yes.

Mr. Russell Cades: I move that the answer be stricken.

The Court: Do you want that out?

Mr. Russell Cades: I think your Honor, it just clutters up the record. If that answer is left in it

(Testimony of Torkel Westly.)

means pursuing the matter and getting into further questions. It is a different type of contract and a different type of problem.

The Court: I understand this is all they want on that cross-examination.

Miss Lewis: I would like to argue this motion if the court is going to entertain the motion.

The Court: All right.

Miss Lewis: It appears under the stipulation that during the period from January to June, 1942, as to which the plaintiff has asked for judgment to recover on the tax, we feel that we are not in court on it, nevertheless some statements were made about the P.N.A.B. Contractors, who were mentioned here. It probably appears that the tax commissioner had given the taxpayer the benefit of reducing the rate on the sales to the P.N.A.B. Contractors from 1½ to ¼ of 1 per cent, and we wanted to show that the reason that was done was that the P.N.A.B. Contractors themselves are taxpayers. It is in line with the practice to which Mr. Westly has testified. We wanted to show that, although it appears in that stipulation, that rate has now been fixed at ¼ of 1 per cent by the tax commissioner, and it was done in accordance with his practice to which Mr. Westly has testified, and as to applying that rate if the person who buys is a taxpayer, and I think this is material to show that the P.N.A.B. Contractors are taxpayers. It explains the thing, and rounds out the whole picture here. If that fact is not explained the court [99] might afterwards, in

(Testimony of Torkel Westly.)

reviewing the case, wonder if there was an inconsistency in the practice in that regard, if that is raised. We have been very liberal in getting the whole picture before the court.

The Court: This may remain in. I take it there is nothing much further.

Q. And those Contractors are now paying the tax at the rate of 1½ per cent?

Mr. Russell Cades: That is objected to.

A. They are.

Mr. Russell Cades: That is objected to, on the explanation—on the statement made by Mr. Westly, why only ¼ of 1 per cent was charged on sales to the P.N.A.B.

(Argument by Mr. Cades.)

(Argument by Mr. Anthony.)

(Argument by Mr. Cades.)

Mr. Russell Cades: I would like to renew my motion to strike the answer to the question that has just been asked.

Mr. Anthony: I have no desire to pursue this any further, your Honor.

(Argument by Miss Lewis on motion to strike.)

The Court: Are you making a motion?

Mr. Russell Cades: I am making a motion to strike the answer, your Honor. Whether it is clear or not, that is not material to the issue which is before your Honor.

(Testimony of Torkel Westly.)

The Court: You are really making a motion to strike in order to be in a position to object to the question, isn't that right? It is just something that occurs repeatedly in trial courts.

Mr. Russell Cades: That is correct. [100]

The Court: The motion to strike is granted, in order that you may object to the question. And you do object to the question?

Mr. Russell Cades: Then I object to the question.

The Court: The objection is sustained, because it was stated that, after the last question, the matter would not be pursued any farther.

Q. Did the Contractors, P.N.A.B. pay taxes for the period January to June, 1942? A. Yes.

Q. At what rate? A. 1½ per cent.

The Court: The P.N.A.B. is what?

Mr. Anthony: Pacific Naval Air Bases, Contractors—or Contractors, Pacific Naval Air Bases.

Mr. Milton Cades: I don't see how that last question has any bearing on the issue here, and I have a motion to strike.

The Court: There was enough time to object, if you felt it necessary, and that time has passed; no objection was made. The question has been answered.

Mr. Milton Cades: We move to strike the answer so as to present our objection.

The Court: I watched very carefully to see if there would be any objection to that question. I

(Testimony of Torkel Westly.)

thought there might be. There wasn't any and the witness answered.

Mr. Milton Cades: Well, your Honor, we were distracted for a moment or we would have objected more promptly. There was a note passed here, if your Honor please, in this connection, in regard to something about this Contractors, P.N.A.B.

Mr. Anthony: What is there before this Court?

Mr. Milton Cades: There is a motion to strike.

The Court: I think you are assuming that you made a motion. I don't remember. Did you really make a motion?

Mr. Milton Cades: I made a motion, if your Honor please.

The Court: May I make another suggestion, gentlemen. It often is required that on any examination only one attorney on each side be heard, because otherwise we get confused. We look to one attorney, when maybe the other attorney is really moving, so with this particular witness for the plaintiff it should be either Mr. Russell Cades or Mr. Milton Cades, and for the defendant either the Attorney General or Miss Lewis. It makes it very difficult for the court to rule, and hard on the reporter. I think you wanted to make a motion to strike, did you not?

Mr. Milton Cades: Yes.

Mr. Anthony: I have no further questions, your Honor.

Mr. Milton Cades: In connection with the motion to strike, the whole testimony with regard to

(Testimony of Torkel Westly.)

the Contractors, P.N.A.B. appears to be based on the fact that the United States by its Attorney General or general counsel has sanctioned the payment of tax to the Territory. Actually, as I recall, and I may be wrong, the stipulation contains a statement that the whole matter is a matter of compromise, and that none of the facts admitted in there are to be taken or used for any other purpose and that the conclusions are not binding on any of the parties for any other purpose except for the purpose of compromise, so that any question as to the payment of the tax by any particular contractor I believe is utterly irrelevant to this matter.

The Court: The statement has been made that the [102] subject will not be pursued any further. The motion to strike is denied.

Mr. Milton Cades: May I take an exception.

The Court: Certainly. The court will take its usual recess for 10 minutes.

(A recess was here taken.)

Mr. Anthony: We rest, your Honor.

Mr. Milton Cades: We have no further evidence to offer. We rest.

(A discussion was held between Court and counsel with respect to the filing of memorandums.)

The Court: Shall we fix it at 15 days, 15 days and 10?

Mr. Milton Cades: Yes, that's right.

Mr. Anthony: Yes, your Honor.
The Court: So ordered.

Case Closed

I Hereby Certify the above and foregoing, pages 1 to 30, inclusive, to be a full, true and correct transcript of my shorthand notes taken in the within-entitled matter at the time and place therein stated.

Honolulu, T. H., March 30, 1944.

/s/ R. N. LINN,
Official Reporter.

[Endorsed]: Filed April 27, 1944. [103]

In the Supreme Court of the Territory of Hawaii

No. 2631

THOMAS H. BRODHEAD,
d.b.a. T. H. Brodhead Co.,
Plaintiff,
Plaintiff-in-Error,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,
Defendant,
Defendant-in-Error.

Action to Recover Gross Income Taxes Paid Under Protest

Error to Circuit Court, First Judicial Circuit
Honorable A. M. Christy, Second Judge, Presiding

WRIT OF ERROR

The Territory of Hawaii: To the Clerk of the Circuit Court, First Judicial Circuit, Territory of Hawaii:

Application having been made on behalf of Thomas H. Brodhead, d.b.a. T. H. Brodhead Co., for a writ of error in the above entitled case, You Are Commanded Forthwith to send to the Supreme Court the record and exhibits in said case.

Witness the Honorable S. B. Kemp, Chief Justice of the Supreme Court of the Territory of Hawaii, this 7th day of August, 1946.

[Seal] /s/ LEOTI V. KRONE,
Clerk of the Supreme Court.

Return to Writ of Error

To the Clerk of the Supreme Court:

The execution of the within writ of error appears by the record hereto annexed.

Dated at Honolulu, T. H., this 16th day of November, 1946.

[Seal] /s/ B. GRIEP,
Clerk of the Circuit Court of the First Judicial Circuit.

[Endorsed]: Filed Aug. 7, 1946. [107]

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Thomas H. Brodhead, doing business as T. H. Brodhead Co., plaintiff-in-error above named, and petitioner for writ of error in the above entitled cause and presents this assignment of errors and says that in the record and proceedings in the above entitled cause, and in the judgment made and entered therein on May 15, 1946, there are manifest and prejudicial errors in the particulars hereinafter set forth, to wit:

Assignment No. 1

The Court erred in making and entering judgment for the defendant (defendant-in-error herein) for the reason that said judgment was contrary to the law, contrary to the evidence and contrary to the weight of the evidence, which judgment was duly excepted to by the defendant.

Assignment No. 2

The Court erred in making and rendering its decision dated May 15, 1946, in that the same was contrary to the law, contrary to the evidence and contrary to the weight of the evidence, which decision was duly excepted to by the defendant. [109]

Assignment No. 3

The Court erred in holding that the General Excise Tax Law of the Territory of Hawaii (Act 141, Series A44, Sessions Laws of Hawaii 1935, as amended) herein referred to as the Excise Tax Law,

imposes a tax and, for the period from October 1, 1942, through March 31, 1944, did impose a tax upon the plaintiff with respect to sales of tangible personal property made to the United States government, its departments and agencies.

Assignment No. 4

The Court erred in holding that Section 3 of said laws did not exempt the plaintiff from tax on the gross proceeds of sales made by him to the United States Government and its Post Exchanges and Ships' Service Stores.

Assignment No. 5

The Court erred in failing to hold that the Legislature in enacting said Excise Tax Law intended to exempt from taxation the proceeds of sales to the United States, its departments and agencies.

Assignment No. 6

The Court erred in holding that the tax as so imposed does not levy a burden upon or interfere with Federal activities.

Assignment No. 7

The Court erred in failing to hold that said Excise Tax Law so administered as to include the gross receipts from sales to the United States, its agencies or instrumentalities, within the measure of tax on the United States which is within the prohibition of the rule against the taxation of a sovereign.

Assignment No. 8

The Court erred in failing to hold that the tax as so imposed is a direct burden on the Federal government in the exercise of its essential governmental power of raising and supporting [110] armies and of providing and maintaining a Navy, and that said tax therefore violates Article I, Section 8, Clauses 12 and 13 of the Constitution of the United States.

Assignment No. 9

The Court erred in holding that such tax had only an economic effect upo nthe United States Government, its departments and agencies, which economic effect is indirect and does not constitute the tax an invalid burden upon or interference with Federal activities.

Assignment No. 10

The Court erred in holding that the imposition of said tax was and is within the power of the Legislature of the Territory under Section 55 of the Hawaiian Organic Act and not in violation of Article I, Section 8, Clause 12 or 13, or the Fifth Amendment of the Constitution of the United States.

Assignment No. 11

The Court erred in failing to hold that said tax violates the Fifth Amendment of the Constitution of the United States in that it constitutes a tax on the privilege of doing business with the United States, its agencies or instrumentalities.

AssignmentNo. 12

The Court erred in holding that said tax did not violate Section 55 of the Hawaiian Organic Act in that it imposes a direct tax on the privilege of doing business with the United States which is a subject beyond the legislative power of the Legislature of the Territory of Hawaii, in that it is not a rightful subject of legislation and in that it is inconsistent with the Constitution and laws of the United States.

Assignment No. 13

The Court erred in holding that the rate of tax imposed by said General Excise Tax Law upon all gross proceeds of [111] sales to the Federal Government and agencies thereof was at the rate of 1½% irrespective of whether such goods were intended to be or were resold by the purchasers.

Assignment No. 14

The Court erred in holding that the tax imposed by said law upon the gross proceeds of sales to United States Post Exchanges and Ships' Service Stores for the purpose of resale was at a rate higher than ¼ of 1%.

Assignment No. 15

The Court erred in holding that a tax on sales to Post Exchanges and Ships' Service Stores at a higher rate than on sales to other retailers is not prohibited as an indirect way of doing what cannot be done directy under the Constitution of the United States.

Assignment No. 16

The Court erred in holding that said tax law required the Tax Commissioner to include in the measure of tax the proceeds of sales to the United States and its agencies at the rate of 1½%.

Assignment No. 17

The Court erred in holding that the administrative practice, whereby the rate of tax on sales to Post Exchanges and Ships' Service Stores was increased because of a judicial determination that Post Exchanges and Ships' Service Stores could not be constitutionally taxed on their sales, did not show that the purpose of the administrators was to accomplish an unlawful result by an indirect method.

Assignment No. 18

The Court erred in holding that the classifications made by the Legislature are "natural and reasonable and not discriminatory" against the plaintiff or the Federal government or its instrumentalities.

Assignment No. 19

The Court erred in holding that Post Exchanges and Ships' Service Stores are not "merchants" within the meaning of the tax law.

Assignment No. 20

The Court erred in holding that a tax upon plaintiff at a higher rate on account of its sales to Ships' Service Stores and Post Exchnges for resale than upon its sales to licensed retailers for resale was

not discriminatory against the plaintiff or the Federal government or its instrumentalities.

Assignment No. 21

The Court erred in holding that the Tax Commissioner did not discriminate in the administration of the tax law against the plaintiff or the Federal government or its instrumentalities.

Assignment No. 22

The Court erred in holding in the Decision and Judgment made and entered in this cause that the plaintiff is not entitled to recover the gross income taxes paid by him under protest or any part thereof for the reason that the Legislature specifically exempted such gross proceeds of sales from the tax law; for the further reason that the Legislature is without power to impose a tax upon the proceeds of gross sales to the United States or its instrumentalities; and for the further reason that in no event can the Legislature impose a tax upon the gross proceeds of sales to Ships' Service Stores and Post Exchanges for resale at a higher rate than that imposed on account of sales to other retailers for resale, namely ¼ of 1%.

Assignment No. 23

The Court erred in failing to make a Judgment in favor of the plaintiff that he recover gross income taxes paid under protest in accordance with his prayer as set forth in the complaint.

Wherefore, plaintiff-in-error and petitioner for writ of [113] error prays that the Judgment made

and entered in the above entitled cause on May 15, 1946, be reversed and for such other and further relief as may be proper.

Dated, Honolulu, T. H., this 7th day of August, 1946.

SMITH, WILD, BEEBE & CADES,

By /s/ MILTON CADES,
Attorneys for plaintiff, plaintiff-in-error.

[Endorsed]: Filed Aug. 7, 1946. [114]

[Title of Supreme Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties to the above entitled cause, through their respective counsel, that the points raised by the assignment of errors of the plaintiff-in-error, filed August 7, 1946, be and they hereby are submitted for the decision of the Court upon the arguments made by the respective parties in their briefs filed in this Court in Supreme Court No. 2583, and without oral argument.

Dated at Honolulu, T. H., February 24, 1947.

SMITH, WILD, BEEBE & CADES,

By /s/ MILTON CADES,
Attorneys for Plaintiff,
Plaintiff-in-Error.

/s/ RHODA V. LEWIS,
Assistant Attorney General,
Attorney for Defendant,
Defendant-in-Error.

Approved:

/s/ S. B. KEMP,
Chief Justice,
Supreme Court of the
Territory of Hawaii.

[Endorsed]: Filed Feb. 24, 1947. [116]

In the Supreme Court of the Territory of Hawaii

October Term 1946

No. 2631

THOMAS H. BRODHEAD

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii.

Error to Circuit Court First Circuit

Hon. A. M. Christy, Judge.

Submitted February 24, 1947. Decided February 25, 1947.

Kemp, C. J., Peters and Le Baron, JJ.

DECISION

Per Curiam. This is a writ of error to review a judgment of the circuit court in an action, tried jury waived, which was brought by the plaintiff-plaintiff in error, under the provisions of section 1575, Revised Laws of Hawaii 1945 (formerly section 571, Revised Laws of Hawaii 1935) to recover taxes paid under protest. The court rendered its decision and judgment in favor of the defendant on May 15, 1946, and the case comes here on plaintiff's

writ of error. This case was previously before the court as No. 2583, on a writ of error filed by the defendant to review a decision and judgment of the circuit court in favor of the plaintiff. This court, by a decision rendered March 4, 1946, denied the plaintiff's petition for rehearing. The previous decision was rendered by a majority of two judges. Mr. Justice Le Baron [118] concurring in part and dissenting in part. The decision and judgment now brought before this court was rendered on the new trial pursuant to the remand of the case in number 2583. Another case, number 2581, which was consolidated for briefing and argument with number 2583 and also remanded for a new trial, is not now before this court.

The parties, by stipulation, have submitted the points raised by the plaintiff's assignment of errors, now before the court, upon the arguments made by the respective parties in their briefs filed in this court in number 2583, and without oral argument. The majority of the court, Chief Justice Kemp and Mr. Justice Peters, are of the same opinion as when this case was heard before, and the dissenting judge, Mr. Justice Le Baron, also is of the same opinion. On the reasoning stated in the opinion of the court, rendered March 4, 1946 (37 Haw. 314), and in the decision denying rehearing on March 27, 1946 (37 Haw. 351), the court holds that the assignment of errors in this case is without merit and accordingly the judgment of the circuit court, Honorable A. M. Christy, Judge, is affirmed. A judgment

is accordance with this decision will be entered upon presentation.

By the Court:

/s/ GUS K. SPROAT,
Clerk.

Smith, Wild, Beebe & Cades for plaintiff-plaintiff in error.

Rhoda V. Lewis, Assistant Attorney General, for defendant-defendant in error. [119]

Approved:

/s/ S. B. KEMP,
Chief Justice.

/s/ E. C. PETERS,
Associate Justice.

/s/ LOUIS LE BARON,
Associate Justice.

Approved as to form:

SMITH, WILD, BEEBE & CADES,

By /s/ MILTON CADES,
Attorneys for plaintiff-plaintiff-in-error.

/s/ RHODA V. LEWIS,
Assistant Attorney General,
Attorney for defendant, defendant-in-error.

[Endorsed]: Filed Feb. 25, 1947. [120]

In the Supreme Court of the Territory of Hawaii

No. 2631

THOMAS H. BRODHEAD,
d.b.a. T. H. Brodhead Co.,
Plaintiff,
Plaintiff-in-Error,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,
Defendant,
Defendant-in-Error.

Action to Recover Gross Income Taxes Paid Under Protest

Error to Circuit Court, First Judicial Circuit
Honorable A. M. Christy, Second Judge, Presiding

JUDGMENT

Pursuant to the written decision of this Court, filed herein on February 25, 1947,

It Is the Judgment of This Court that for the reasons set forth in said decision, the judgment of the Circuit Court that the plaintiff take nothing by

his complaint and dismissing the action, be and it hereby is affirmed.

Dated at Honolulu, T. H., February 25, 1947.

By the Court:

[Seal] /s/ GUS K. SPROAT,
Clerk.

Approved:

/s/ S. B. KEMP,
Chief Justice,
Supreme Court of the
Territory of Hawaii.

Approved as to form:

SMITH, WILD, BEEBE &
CADES,

By /s/ MILTON CADES,
Attorneys for Plaintiff,
Plaintiff-in-Error.

[Endorsed]: Filed Feb. 25, 1947. [122]

In the Supreme Court of the Territory of Hawaii,

October Term, 1945

THOMAS H. BRODHEAD

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii.

Nos. 2581 and 2583

Error to Circuit Court First Circuit

Hon. J. A. Matthewman, Judge

Argued November 19, 20, 1945

Decided March 4, 1946

Kemp, C. J., Peters and Le Baron, JJ.

Territories—legislative power—taxation.

The legislature of the Territory is empowered to lay an excise tax upon all businesses and activities carried on in the Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be.

Licenses—for occupations and privileges—constitutionality and validity.

Such a tax is not within the implied constitutional prohibition against laying a burden upon or interfering with federal activities merely because in its incidence it might indirectly reach a federal instrumentality.

Id.—id.

The general excise tax law of 1935 is valid although in [124] its incidence it indirectly affects the United States Government and its departments or agencies.

Id.—id.—subjects of license or tax—wholesalers.

Where the tax upon sales of tangible personal property is applicable generally to "every person engaged or continuing in the business of selling" the same, from whom is excepted wholesalers, sales not coming within the statutory definition of "wholesalers," are subject to the rate of tax applicable to "every person" and not to the rate of tax applicable to wholesalers.

Tax—constitutional requirements and restrictions—discrimination.

The legislature may classify objects for the purpose of taxation. Diversity of rate of taxation based upon proper classification of the objects of taxation is not discrimination.

OPINION OF THE COURT BY PETERS, J.

(Le Baron, J., concurring in part and dissenting in part.)

The opinion of Mr. Justice LeBaron renders a statement of the case and of the errors relied upon unnecessary. It will suffice to state our conclusions.

As we view the case, the extension by section 55 of the Organic Act of the legislative power of the

Territory to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, locally applicable, includes the power to lay, consistently with the restriction and limitations imposed by the Constitution and laws of the United States, an annual excise tax upon all businesses and activities carried on in the Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case might be.[1] A tax imposed by a nonfederal political agency, however reasonable, universal and nondiscriminating, the legal effect of which is to lay a direct and immediate tax upon the instrumentalities of the United States, is within the implied prohibition of the Constitution of the United States against laying a burden upon or interfering with federal activities,[2] even though imposed under the guise of an excise tax.[3] A nondiscriminating territorial excise tax measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, is not within the constitutional pro-

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[1]W. C. Peacock & Co. v. Pratt, 121 Fed. 772; Haavik v. Alaska Packers Assn., 263 U. S. 510, 513; Kitagawa v. Shipman, 54 F. (2d) 313, 318; Yerian v. Territory of Hawaii, 130 F. (2d) 786, 788; Robertson v. Pratt, 13 Haw. 590.

[2]Johnson v. Maryland, 254 U. S. 51, 55; Mayo v. United States, 319 U. S. 441.

[3]Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292; Northwestern Ins. Co. v. Wisconsin, 275 U. S. 136; Panhandle Oil Co. v. Knox, 277 U. S. 218; Macallen Co. v. Massachusetts, 279 U. S. 620.

hibition merely because in its incidence it might indirectly [126] reach a federal instrumentality.[4] It was the intention of the legislature, as manifested by sections 2, 24 and 3 of the general excise tax law of 1935, that in the computation of the tax there be excepted from gross proceeds of sales or gross income only so much of the gross proceeds of sales or gross income derived from the sales made to the United States Government, its departments or agencies, which was then or might thereafter be exempted from taxation under the Constitution of the United States or the Organic Act of the Territory, such exception, however, not to apply if and when the Congress of the United States permitted the Territory to impose a privilege tax upon gross proceeds of sales made to the United States Government, its departments or agencies. And although in its incidence the local general excise tax law of 1935[5] indirectly affects the United States Government and its departments or agencies, its economic

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[4]Society for Savings v. Coite, 6 Wall. 594 (1867); Home Ins. Co. v. New York, 134 U. S. 594 (1889); Provident Institution v. Massachusetts, 6 Wall. 611 (1867); Hamilton Company v. Massachusetts, 6 Wall. 632 (1867); Metcalf & Eddy v. Mitchell, 269 U. S. 514 (1925); Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319 (1915); Trinityfarm Co. v. Grosjean, 291 U. S. 466 (1933); James v. Dravo Contracting Co., 302 U. S. 134 (1937); Alabama v. King & Boozer, 314 U. S. 1 (1941); Curry v. United States, 314 U. S. 14 (1941).

[5]Sess. Laws 1935, Act 141.

effect is consequential and remote and not immediate and direct.[6]

Whether or not the effect of the decision in the case of Panhandle Oil Co. v. Knox was to extend constitutional immunity from taxation under the local excise law to the gross proceeds of sales to federal instrumentalities is deemed of no importance further than it may serve to ascertain the legislative [127] intent in the use of the language contained in section 3 of the Act. Nor whether the King & Boozer case overruled the Panhandle Oil Co. case. The tax, the legality of which is in question herein, was assessed for the year 1942. The King & Boozer case was decided in November, 1941. And the rationale of the King & Boozer case applies[7] without the necessity of further legislation on the subject.[8] Nor are we concerned with the question of whether the legislature was correct in assuming, as indicated by the proviso of section 3, that the Congress of the United States is authorized to permit the Territory to impose a privilege tax upon gross proceeds or gross income derived from sales made to the United States Government, its depart-

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[6]Alabama v. King & Boozer, supra. See also dissenting opinion of Mr. Justice Holmes in Panhandle Oil Co. v. Knox, supra, dissenting opinion of Mr. Justice Stone in Macallen Co. v. Massachusetts, supra; Trinityfarm Co. v. Grosjean, supra.

[7]Philadelphia v. Schaller, 148 Pa. Super. Ct. 276, 25 A. (2d) 406, cert. denied 317 U. S. 649.

[8]Western L. Co. v. State Bd. of Equalization, 11 Cal. (2d) 156, 78 P. (2d) 731.

ments or agencies or that it was legally necessary to do so. An intent clearly and unequivocally expressed is no less so because it may be based upon a false hypothesis.

The only troublesome question involved is whether the rate to be applied to gross proceeds of sales or gross income, as the case might be, should be one and one-half per cent, the rate applicable to "every person engaging or continuing * * * in the business of selling any tangible personal property whatsoever (not including, however, bonds or other evidence of indebtedness or stocks)" or the rate of one [128] quarter of one per cent, the rate applicable "in the case of a wholesaler or producer."

Section 2, B (1) of the Act imposes a tax "Upon every person engaging or continuing within this Territory in the business of selling any tangible personal property whatsoever (not including, however, bonds or other evidence of indebtedness or stocks)" of one and one quarter per cent (since increased to one and one-half per cent) of the gross proceeds of sales of the busniess, except in the case of wholesalers or producers, in which case it is one quarter of one per cent. Section 1, paragraph (8) defines "gross proceeds of sale" as the "value actually proceeding from the sale of tangible personal property without any deduction on account of the cost of property sold or expenses of any kind." Section 1, paragraph (10) defines a wholesaler as "a person doing a regularly organized wholesale or jobbing business, known to the trade as such, and only with respect to the following sales: (a) sales, to a licensed

retail merchant or jobber, for purposes of resale; (b) sales, to a licensed manufacturer, of material or commodities which are to be incorporated by such manufacturer into a finished or saleable product (including the container or package in which the product is contained) during the course of its preservation, manufacture or processing, including preparation for market, and which will remain in such finished or saleable product in such form as to be perceptible to the senses, which finished saleable product is to be sold and not otherwise used by such manufacturer; or (c) sales, to a licensed contractor, of material or commodities which are to be incorporated by such [129] contractor into the finished work or project required by the contract and which will remain in such finished work or project in such form as to be perceptible to the senses." It is apparent from the foregoing references to the Act that the legislature intended that the rate of tax applicable to the gross proceeds of all sales of tangible personal property should be one and one-quarter per cent or such rate to which the same might be decreased or increased under the provisions of section 2, III, except in the cases of sales made by a wholesaler as defined and in respect to the types of sales enumerated and defined in section 1, paragraph (10) (a), (b) or (c), and except in case of sales made by a producer, when the rate should be one quarter of one per cent. Whether or not, after excluding wholesalers or producers from the all-inclusive phrase "upon every person," retailers alone remain is a question that is not involved. The

Act, besides carrying its own definition of a "wholesaler" and the sales to which the term shall apply, thus restricting and limiting the ordinarily accepted meaning of the term "wholesaler," also carries a definition of the term "retailer" [§ 1, par. (13)] and of the term "producer" [§ 1, par. (11)]. Unquestionably, the phrase "upon every person" includes retailers, and this conclusion is confirmed by the running head of section 1, B, and the administrative regulations in respect to retailers contained in section 2, 1-B (1), (3), (4) and (5).

It is conceded that the tax in question involves sales of tangible personal property, not including bonds or other evidence of indebtedness or stocks. Hence, the gross proceeds of sales made by the taxpayer of tangible personal [130] property was subject to a tax of one and one-quarter per cent unless, as claimed by him, they were made by him as a wholesaler and come within any of the categories of sales defined in section 1, paragraph (10) (a), (b) or (c). The taxpayer claims that the sales made to post exchanges and ships' service stores come within section 1, paragraph (10) (a). It is admitted by the Territory that the taxpayer does a regularly organized wholesale business, known to the trade as such, and that the sales involved were for the purpose of resale. But are post exchanges and ships' service stores "licensed merchants," as that term is used in section 1, paragraph (10) (a)? We think not. Post exchanges and ships' stores are admittedly federal instrumentalities. While post exchanges and ships' stores sell at "retail" and the sales in question were

made for purpose of resale, neither post exchanges nor ships' stores are "licensed," as that term is used in section 1, (10) (a). By section 21 of the Act all persons having gross proceeds of sales upon which a privilege tax is imposed by the Act are required, as a condition precedent to engaging or continuing such business, to secure an annual license upon conditions that are immaterial to our discussion. It is therein further provided that: "Any person who may lawfully be required by the Territory, and who is required by this Act, to secure a license as a condition precedent to engaging or continuing in any business subject to taxation under this Act, who shall engage or continue in such business without securing such license in conformity with this Act, shall be guilty of a misdemeanor * * *." A privilege tax is not imposed by the Act upon the gross proceeds of sales by federal instrumentalities. While [131] not expressly exempted, they are, as heretofore pointed out, immune from such taxation by the Territory. Hence, one of the essential attributes of a "licensed merchant" is absent and the legal effect is to exclude such sales from the category of sales defined in section 1, paragraph (10) (a). In other words, in respect to sales to federal instrumentalities, the taxpayer was not a wholesaler as defined in the Act.

In our opinion the word "licensed" included in the definition of sales in section 1, paragraph (10) (a), was used by the legislature advisedly. It must be assumed that it was advised of the immunity from taxation of federal instrumentalities. It extended

exemptions by the Act itself to certain business activities exercising retail functions, viz., hospitals, infirmaries and sanatoria. It no doubt had in mind other business activities which, though retailers in a popular sense, nevertheless legally were not retailers under the terms of the Act. In each of the instances referred to no license is required under the provisions of section 21 of the Act. From all this it is abundantly clear that by the use of the word "licensed" the legislature intended to exclude from the definition of "wholesaler" sales made to persons exercising retail functions who under the provisions of the Act were not required to be licensed.

Nor are we satisfied that post exchanges and ships' service stores are "merchants" in the sense that the term "merchant" is employed in section 1, paragraph (10) (a). The Act itself does not define the word "merchant." Hence, its common-law meaning controls. A merchant has been defined as [132] one who is engaged in buying and selling goods, wares or merchandise for gain or profit.[9] The army regulations governing post exchanges are in evidence. It was stipulated that ships' service stores have the same relation to the United States Navy as post exchanges have to the United States Army. The regulations governing post exchanges are epitomized in the opinion of the court in the case of

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[9]Bacon v. Cannady, 144 Ga. 293, 86 S. E. 1083; In re Jupp, 274 Fed. 494; Rosenbaum v. City of Newbern, 118 N. C. 83, 24 S. E. 1; H. H. Kohlsaat & Co. v. O'Connell, 255 Ill. 271, 99 N. E. 689.

Standard Oil Co. v. Johnson, 316 U. S. 481, at 484. It was there held: "* * * post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it." If post exchanges and ships' service stores as now operated are arms of the Government and integral parts of the respective services to which they are attached, their functions are governmental and not proprietary,[10] and in whomever the title to the tangible personal property sold may be vested immediately prior to sale, such person is not a "merchant" within the meaning of section 1, paragraph (10) (a) of the Act. For this additional reason the taxpayer was not a wholesaler as defined in the Act.

Nor does the imposition of the higher rate of taxation applicable to "every person" juridically discriminate against sales to federal instrumentalities.

The term "retailer" is defined in the Act as "any person who sells, other than as a wholesaler within the definition of this Act, tangible personal property for consumption or use by the purchaser and not for resale." The statutory [133] definition of the word "wholesaler" has already been quoted. If, as heretofore held, the taxpayer is not a "wholesaler" as defined by the Act and is included in the all-inclusive term of "every person" employed in section 2,

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[10]Fed. Land Bank v. Bismark Co., 314 U. S. 95, 102.

B, which levies the tax, he is simply one of a class to which the rate imposed uniformly applies. "Every person" selling to federal instrumentalities pays the same tax. All vendors of the same class are treated alike. Moreover, by the same token, sales to retailers are divided into two classes, viz., (1) sales to a retailer either not licensed or not a merchant, when the vendor falls into the category of "every person" and the higher rate applies, and (2) sales "to a licensed retail merchant for purposes of resale" when the vendor falls into the excepted class of "wholesaler" and the lower rate applies. In either case all vendors in the respective classes to which they belong are treated uniformly and pay the same applicable tax.

The exception of "wholesalers" as a class from "every person" as a class affects a natural and reasonable classification of vendors especially where, as here, it synchronizes with the evident intent of the legislature, speaking generally, that sales of tangible personal property in their normal distribution through commercial channels bear two taxes, viz., one when sold at wholesale when the rate is one-quarter of one per cent and one when sold at retail when the rate is one and one-half per cent. The same may be said of the classification of sales to retailers where resales by the retailers are nontaxable by reason of immunity, exemption or otherwise. They are readily distinguishable from sales to a "licensed retail merchant." And the legislature [134] apparently intended that as to each class a different rate of taxation obtain, in the former the

rate of one and one-half per cent as sales made by "every person" and in the latter one-quarter per cent as sales made by a "wholesaler." The well-settled rule that the legislature may classify objects for the purposes of taxation has long since received recognition and been applied by this court.[11] Diversity of rate of taxation based upon proper classification of the objects of taxation is not discrimination. It would serve no useful purpose to pedantically repeat what this court has heretofore said on the subject. The language of the court in the Robertson case and the authorities there cited are equally applicable here.

Moreover, factually no discrimination exists against sales to post exchanges or ships' service stores. If anything, it is the other way about. And of this plaintiff does not complain.

It has been tritely said that the ultimate consumer always pays the tax. Here it is a question of the absorption of the tax by the retailer. The post exchanges and ships' service stores, however, by reason of their immunity, absorb less in taxes under the general excise tax law of 1935 than licensed retail merchants. In the former case the tax to be absorbed is only one and one-half per cent, in the latter one and three-fourths per cent. The result is that the purchasers to whom sales at post exchanges and ships' service stores are restricted as ultimate consumers pay less [135] than the general public purchasing from licensed retail merchants.

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[11]Naone v. Thurston, 1 Haw. 392; Campbell v. Shaw, 11 Haw. 112; Robertson v. Pratt, supra.

The judgment appealed from is reversed and the cause remanded for a new trial.

R. V. Lewis, Assistant Attorney General (also on the briefs) for Tax Commissioner, defendant-plaintiff in error.

M. Cades (Smith, Wild, Beebe & Cades on the brief) for plaintiff-defendant in error.

/s/ S. B. KEMP,

/s/ E. C. PETERS. [136]

OPINION OF LE BARON, J.

(Concurring in part and dissenting in part)

The defendant in error, hereinafter referred to as the taxpayer, under protest paid two privilege taxes to the Territory of Hawaii, pursuant to the "General Excise Tax Law" popularly known as the "Gross Income Tax Act." (Act 141, S. L. 1935, as amended, now §§ 5441-5482, R. L. H. 1945.) One tax was levied and collected by the plaintiff in error, hereinafter referred to as the tax commissioner, upon the taxpayer's gross proceeds of or income derived from sales, made for the use and consumption of various federal departments, to the United States and the other was likewise levied and collected upon those of or derived from sales, made for purposes of resale, to post exchanges of the Army and ships' services of the Navy of the United States. For convenience both sets of sales are referred to collectively as "federal sales" and the

taxes with respect to them as the "tax," except as the context hereof may otherwise require. They were made and collected respectively for a period beginning July 1, 1942, and ending March 31, 1944.

The taxpayer brought appropriate action to recover the tax. After trial, jury waived, the trial judge found no legislative intent in the Act to impose taxation upon gross proceeds of or gross income derived from federal sales and rendered judgments accordingly for full recovery of the tax paid. From these judgments the tax commissioner sued out writs of error which have been consolidated for hearing and argument before this court.

Four main questions are posited on appeal. Did the legislature intend to impose taxation upon gross proceeds of or gross income derived from federal sales? If it did, is its imposition valid? If the imposition is valid, then is the rate at which the tax was assessed relative to sales, made for the purposes of resale, to post exchanges and ships' services authorized by the legislature, the taxpayer not protesting the rate assessed relative to sales, made for use and consumption, to the United States? If authorized, is that assessment valid?

In section 2, subsection 1, of the Act, the legislature imposes privilege taxes upon "the persons on account of their business and other activities in this Territory," thereby plainly identifying the persons taxable under the Act and clearly explaining why they are taxable without any limitation whatsoever respecting the character of persons with whom they may deal or the nature of the business of such other

persons. This imposition of tax embraces "every person engaging or continuing within this Territory in * * * business" or other activity as designated and set forth by the paragraphs immediately thereunder. The legislative intent therein manifested is consonant with the general purpose of the Act to exercise the legislative tax power of the Territory to the full extent permitted by the Organic Act of the Territory and the Constitution of the United States, such purpose being indicated by its general severability clause and special provision directed against any unconstitutional taxation upon gross proceeds of sales derived from sales made to the United States, its departments or agencies. (§§ 24 and 3, supra.) In the general severability clause the legislature contemplates the possibility that some portions of the Act after its enactment would be declared invalid and provides against the impairing of the remaining portions by reason of such a declaration, expressly stating that "If the application of any provision of this Act to any person or circumstances is held invalid, the [138] application of such provision to other persons or circumstances shall not be affected thereby." (§ 24, supra.) In the specific provision relative to unconstitutional taxation, the legislature, pertinent to the case of the taxpayer, provides that: "In computing the amounts of any tax imposed under this Act, there shall be excepted from the gross proceeds of sales * * * so much thereof as * * * is derived from any sales made to the United States government, its departments or agencies, which is, or may here-

after be, exempted * * * under the Constitution of the United States or the Organic Act of the Territory * * *." (§ 3, supra.) Post exchanges and ships' services of the Army and Navy undisputedly come within the term "its departments or agencies" and sales to them as well as to the United States likewise come within the term "federal sales" as used in this opinion. (See Standard Oil Co. v. Johnson, 316 U. S. 481, 86 L. Ed. 1161.) While such specific exclusion may not have been necessary in view of the comprehensive nature of the severability clause, it manifests a caution by the legislature which in no way detracts from the force of the plain, certain and unambiguous language employed. A bare reading of it as well as of the Act as a whole suffices to demonstrate that all gross proceeds of sales capable of being taxed by the Territory under the Constitution or Organic Act are clearly within the scope of taxation intended by the legislature.

Consequently, the first basic issue to be determined relative to whether gross proceeds of federal sales are within the scope of the Act is whether they at the time of receipt and levy were in fact precluded therefrom by the Constitution of the United States by reason of an exemption from taxation therein, the parties being agreed that the meaning of the [139] Constitution in respect to such an exception must be found in the decisions of the Supreme Court of the United States.

In considering such decisions, it is evident that the Supreme Court of the United States had adopted, prior to the Act's effective date of July 1,

1935, a construction of the Federal Constitution exempting federal sales from any taxation by a State without regard to whether the tax is discriminatory or nondiscriminatory. (Panhandle Oil Co. v. Knox, 277 U. S. 218, 72 L. Ed. 857; see Indian Motorcycle Co. v. United States, 283 U. S. 570, 75 L. Ed. 1277; Graves v. Texas Company, 298 U. S. 393, 80 L. Ed. 1236.) On the other hand, it is equally evident that the Supreme Court of the United States in 1937 began to whittle away the efficacy of such construction with respect to nondiscriminatory taxation until finally in 1941 that Court held that the holding of the Panhandle Oil Co. case and its line of cases invalidating a nondiscriminatory tax on federal sales was no longer tenable and upheld the validity of such a tax. (James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155; Alabama v. King & Boozer, 314 U. S. 1, 86 L. Ed. 3; Curry v. United States, 314 U. S. 14, 86 L. Ed. 9; Penn Dairies v. Milk Control Comm'n., 318 U. S. 261, 87 L. Ed. 748.) The effect of these decisions is that from the time of the enactment of Act 141 the meaning of the Constitution as construed by the Supreme Court of the United States underwent a complete change with respect to nondiscriminatory taxation of federal sales by a State being exempt so that after 1941 they were held to be rightful subjects of state nondiscriminatory taxation and no longer exempt therefrom under the Constitution. This later construction has not since been overruled. It is therefore controlling as well as decisive of the first basic issue provided that

what are rightful subjects of nondiscriminatory taxation for States are also ones for the Territory. Notwithstanding the sovereignty of political independence and possession of original and underived powers existing in [140] a State and the lack thereof to the Territory, there is no substantial difference between the nature and extent of a State's legislative power and those of the Territory when not curtailed by Congress, it having given full authority to the legislature of the Territory by the Organic Act in section 55 thereof to legislate upon "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable" and having thereby vested in the legislature the full taxing power which had theretofore existed in Congress over the Territory of Hawaii. (See Assessor v. Com. Cable Co., 16 Haw. 396; Haavik v. Alaska Packers Assn., 363 U. S. 510, 68 L. Ed. 414; Kitagawa v. Shipman, 54 F. (2d) 313, aff'g. 31 Haw. 726; Yerian v. Territory of Hawaii, 130 F. (2d) 786, aff'g. 35 Haw. 855; Gromer v. Standard Dredging Co., 224 U. S. 362, 56 L. Ed. 801.) It follows therefrom that what are rightful subjects of nondiscriminatory tax for States under the Constitution are also ones for the Territory in the absence of laws of the United States to the contrary or exempted from taxation under the Organic Act of the Territory. Whether this latter limitation exists presents the second basic issue, closely integrated to the first.

Any exemption of such rightful subjects of legislation, as are the taxpayer's gross proceeds of fed-

eral sales, from nondiscriminatory taxation by the Territory under the Organic Act would be purely objective, the test being whether the extending to them of the legislative power of the Territory is "inconsistent with the Constitution and laws of the United States locally applicable." (Organic Act § 55.) As no such inconsistency has ever existed with respect to the laws of the United States and none with respect to the Constitution after 1941, the taxpayer's gross proceeds of federal sales are not so exempt under the Organic Act. Neither being exempt under the Constitution, they therefore fall within the scope of taxation intended by the legislature and its imposition of tax upon them, [141] aside from the rate at which assessed, is a valid exercise of "the legislative power of the Territory," the specific cautionary provision of section 3 relative to their mandatory exclusion in computing the tax being inapplicable, as likewise is the general severability clause of section 24.

The taxpayer, nevertheless, contends that the legislature intended by the considered provision of section 3, supra, to incorporate into the Act the legal effect of the Constitution, as construed by the Panhandle Oil Co. case, for the purpose of limiting the Act's scope independently of any change in the meaning of the Constitution which subsequently may be attributed to it by the Supreme Court of the United States. The difficulty, however, is that the legislature expressed no such intent. The taxpayer premises his contention upon the authority of Helvering v. Griffiths, 318 U. S. 371, 87 L. Ed.

843, and Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. Ed. 184. Such authority has no application to Act 141. The cases of Helvering and Parker before the Supreme Court of the United States turn upon an unequivocal legislative history of the statutes unde rconsideration, the history recognizing the controlling effect of one of that Court's prior cases which had not been reversed or abrogated at the time the subject of the tax was received by the taxpayer on one hand or at the time of death of an employee on the other. In the instant case there is no such legislative history of Act 141 and at the time of its enactment the case of the Supreme Court of the United States, construing the Constitution as effecting an exemption from nondiscriminatory state taxation then in force, was no longer in force when the subjects of taxation were received and the protested tax levied. Furthermore, in the Helvering case the Supreme Court of the United States was urged to reverse its prior decision, which it declined to do because it could not find that Congress intended to tax the subject in question, whereas no such request was or could be made of this court, which is confronted with an existing construction of the Constitution by the Supreme Court of the United States in abrogation of its prior construction as a fait accompli and does find from the language of the Act itself that the legislature clearly intended to impose and authorize a tax upon the subjects in question. Again in the Parker case the Supreme Court of the United States refused to read a portion of the statute under consideration in a

manner that would "defeat" its purpose, whereas this court reads a portion of the Act under consideration according to the ordinary and plain meaning of its language in a manner that effectuates its purpose as well as that of the Act as a whole.

In further support of his contention, the taxpayer argues that the proviso immediately following the considered provision of section 3, supra, is indicative of an intention that when once an exemption from taxation under the Constitution has been construed by the Supreme Court of the United States to have existed at the time Act 141 became effective, the exception of gross proceeds of federal sales in computing the amounts of the tax imposed by the Act becomes absolute, subject to enlargement by further exemptions thereunder until such time as the Territory is permitted by Congress to tax gross proceeds derived from federal sales. To such argument I cannot accede. The pertinent part of the proviso reads: "provided, however, that if and when the Congress of the United States shall permit the Territory of Hawaii to impose a privilege tax upon gross proceeds of sales * * * derived from * * * sales made to the United States government, its departments or agencies, in * * * such event the exception(s) and exemption(s) by this section provided, shall not apply." The language of this proviso does not conflict with that of the preceding provision nor alter its meaning. Hence the broad scope of taxation intended by the legislature is unaffected thereby. Furthermore, the proviso itself has no operative force in this case in that the legislature

did not intend to make an exception of any gross proceeds of sales that are capable of being taxed by the Territory under the Constitution or Organic Act, the existence of an exemption thereunder being the condition precedent for the applicability of the exception and congressional permission the condition subsequent for the inapplicability thereof. Without more the contention of the taxpayer is untenable, he having failed to sustain his burden of establishing that his gross proceeds of federal sales come within the exception stated by the Act. (See Re Excise Tax Rob't Hind, Ltd., 34 Haw. 40.)

A nondiscriminatory tax on gross proceeds of federal sales made both for use and consumption and for purposes of resale being within the Act's scope of taxation, the next question for consideration is whether the rate assessed by the tax commissioner against the taxpayer's gross proceeds or gross income derived from sales of tangible personal property, made for purposes of resale, to post exchanges and ships' services of the United States Army and Navy, respectively, is authorized by the legislature. For convenience, these sales are referred to as "post exchange sales" and post exchanges and ships' services as "post exchanges." The taxpayer in making such sales classified himself as a wholesaler and his business of selling to post exchanges as that of a wholesaler for the purpose of paying a tax assessment in respect thereto at the rate of one quarter [144] of one per cent. The commissioner reclassified the taxpayer and his business to the class and category of a retailer for the pur-

pose of assessing the rate of one and one half of one per cent. The taxpayer protests this action of the tax commissioner and challenges his authority under the Act so to do, asserting that the lower rate is the applicable one authorized by the legislature.

Recognizing that a substantial property right of the taxpayer is here involved, I neither presume that the taxpayer is attempting to avoid his duty to the Territory to pay the full amount of the tax imposed against him or that the tax commissioner is attempting to exact unjustly a greater amount of tax than authorized. I do not presuppose in favor of either, but will apply the usual test of statutory construction to declare what the legislature means by the language it has used.

The legislature in section 2, subsection 1, of the Act not only imposes privilege taxes upon "the persons on account of their business and other activities in this Territory" but also provides for the assessment and collection of those taxes. It accomplishes this by the application of percentage rates against "values, gross proceeds of sales or gross income, as the case may be" as the measure of the tax imposed. These rates are specified in paragraphs A to and including H of section 2, subsection 1, immediately following the imposition of taxation. As indicated by their running heads, these paragraphs designate the various businesses and activities with respect to which the specified rates are made applicable. The running heads are: A. Tax on manufacturers; B. Tax on retailers, wholesalers and producers; C. Tax upon contractors; D. Tax upon theaters,

amusements, radio broadcasting stations, etc.; E. Tax upon printers and publishers [145] (deleted by L. 1939, c. 252, subsec. 1); F. Tax on service business; G. Professions, and H. Tax on other business. Such are a brief of the designated businesses and activities to which rates specified by each paragraph are made applicable in measuring the tax imposed. The legislature, however, in section 4 of the Act, expressly exempts certain persons therefrom, the section having no application to the taxpayer.

The tax commissioner justifies his reclassification of the taxpayer and his selling to post exchanges to the class and category of a retailer upon section 2, subsection 1, paragraph B(1) of the Act and rests thereon his authority to assess the higher rate. This paragraph reads: "Tax on retailers, wholesalers and producers. Upon every person engaging or continuing within this Territory in the business of selling any tangible personal property whatsoever (not including, however, bonds or other evidence of indebtedness or stocks) there is likewise hereby levied and shall be assessed and collected a tax equivalent to one and one-quarter (1¼) per cent of the gross proceeds of sales of the business; provided, however, that in the case of a wholesaler or producer the tax shall be equal to one quarter (¼) of one per cent of the gross proceeds of sales of the business." The higher rate so specified is also specified in paragraph H of the same subsection and wherever provided in the Act has been duly increased to one and one-half (1½) per cent pursuant

to section 2, subsection III of the Act, as amended by Act 128 of Session Laws 1937. The percentage rate of one and one half will therefore be considered as constituting the higher rate for the purposes of this opinion.

It is evident from the Act as a whole, including the running head "Tax on retailers * * *" of paragraph B in part (1) thereof and references to "the tax on retailers" and "any person engaging or continuing in business as a retailer" of parts (2) and (3) thereof, that the "every person" referred to in part (1) of paragraph B means those "engaging and continuing within the Territory in the business of selling" as a retailer and the tax assessed accordingly at the higher rate to be the tax on retailers.

The cases of a retailer and wholesaler (that of a producer concededly having no applicability) as dealt with by the legislature are stated by the definitions of the Act. Pertinent to the case of the taxpayer, they read: "When used in this Act, unless otherwise required by the context * * * 'Retailer' shall mean any person who sells, other than as a wholesaler within the definition of this Act, tangible personal property for consumption or use by the purchaser and not for resale. * * * 'Wholesaler' * * * shall apply only to a person doing a regularly organized wholesale * * * business, known to the trade as such, and only with respect to * * * sales, to a licensed retail merchant or jobber for the purposes of resale * * *." (Section 1, (13) and (10), respectively, supra.

The undisputed evidence establishes that the tax-

payer in selling the tangible personal property to post exchanges was doing a regularly organized wholesale business, known to the trade as such, and that his sales were for the purposes of resale; that such sales were not for consumption or for use by the purchaser as the words "consumption" and "use" are restricted by the phrase "and not for resale" in the statutory definition of a retailer. However, such evidence also shows that the purchasing post exchanges, operating exclusively under Army Regulations [147] of the War Department, were not licensed under the Act nor required to be; that they conducted no business subject to taxation under the Act; were not wholesalers, jobbers or consumers but, as instrumentalities of the United States and arms of the War Department, they in the performance of governmental rather than proprietary functions maintained retail stores, bought for the purpose of resale and resold at the lowest possible prices to the armed forces and civilian employees of the Federal Government on army posts and naval stations for the consumption or use by such purchasers, for their convenience and for additional benefits to the armed forces not otherwise provided by the Government. (See Army Regulations No. 210-65 of the War Department; Standard Oil Co. v. Johnson, supra; Fed. Land Bank v. Bismarck Co., 314 U. S. 95, 86 L. Ed. 65.)

The above facts conclusively show that the case of the taxpayer in selling tangible personal property to post exchanges did not fulfill a definitive requirement of the statutory case of a retailer in

that he clearly did not sell "for consumption or use by the purchaser and not for resale." They require, however, a consideration of whether the case of the taxpayer is that of a wholesaler within the meaning of the Act.

In determining whether the taxpayer's case is that of a wholesaler under the Act the phrase "to a licensed retail merchant or jobber" must be construed, the case of the taxpayer clearly fulfilling the other requirements relative to the nature of a wholesaler's business and the purposes of sales thereof. The alternative requirement of a "jobber" with respect to the purchaser need not be considered, post exchanges admittedly not being jobbers and the case of the taxpayer in selling to them therefore standing or falling as a case of a [148] wholesaler upon the purchasing post exchanges meeting or failing to meet the other alternative of "a licensed retail merchant." The noun "merchant" is not defined by the Act and hence its plain, ordinary and commonly accepted meaning must be taken to be the one intended. That meaning is that a merchant is "One who carries on a retail business; a storekeeper or shopkeeper." (Webster's International Dictionary, 2d ed.) This meaning is amplified by the Act's definitions of the words "retail" and "business." (§ 1, [7] and [12], respectively, supra.) So amplified the meaning of the noun "merchant" is one who carries on retail "activities * * * engaged in or caused to be engaged in with the object of gain or economic benefit either direct or indirect" (§ 1, [7], supra), in the selling of "tangible personal

property, other than by a wholesaler as such within the definition of the Act, for consumption or use by the purchaser and not for resale." (§ 1, [12], supra. The intended meaning of the noun "merchant" modified by the adjective "retail" is thus but a paraphrase of the noun "retailer" as defined by the Act (§ 1 [13], supra), and hence serves to identify the purchaser as a retailer in contradistinction to a wholesaler, jobber, or consumer. It primarily serves, however, to prevent the lower rate from being applicable to the case of a wholesaler selling to a consumer. In applying this meaning to the facts concerning the purchasing post exchanges, they admittedly not being wholesalers, jobbers or consumers, it is undisputable that they not only qualify as a "retail merchant" but meet every requirement set forth in the statutory definition of a "retailer," they carrying on retail businesses as retail storekeepers and exclusively purchasing as retailers, reselling as retailers and engaging in retail activities "with the object of * * * economic benefit either direct or indirect," if not of "gain." It is therefore evident that the only part of the requirement of a wholesaler which the case of the taxpayer in selling to them could have failed to meet is that contained in the adjective "licensed," his sales not being made to retail merchants licensed under the Act.

The employment by the legislature of the adjective "licensed" to modify a purchasing retail merchant in wholesale sales to him in my opinion is susceptible to two reasonable constructions, one being confined to the state of being licensed in a

strict statutory sense and to the implications arising from the requirements set forth in section 21 of the Act that "any person who shall have * * * gross proceeds of sales upon which a privilege tax is imposed by this Act, as a condition precedent to engaging or continuing in such business, shall * * * obtain * * *, upon payment * * * of one dollar ($1.00), a license * * *" and the other being not so confined. In that the first readily has been adopted by the parties hereto as well as by my associates and the issues before this court having been raised under it, that construction will be considered first. Under it, the construed legislative intent would be that in order for the lower rate to be applicable the purchaser must appear to be a taxable person under the Act on subsequent retail resale, thereby preserving in a present wholesale sale the opportunity of collecting ultimately at the higher rate and where such opportunity is foreclosed by the unlicensed status of the purchaser under the Act to immediately assess the higher rate against the seller. So construed the Act would clearly not be a uniform excise tax law with respect to sales of tangible personal property sold for purposes of resale by a seller doing a regularly organized wholesale business, known to the trade as such.

The only possible explanation of why the purchasing post exchanges have an unlicensed status under the Act is because they are exempt on ultimate retail sale from taxation by the Constitution of the United States. Hence the status is merged with the constitutional exemption and is but one

of its incidents. Under the construction being considered it is evident that the constitutional exemption would not only be disregarded by it but regarded as the basic reason for the higher assessment. The legislature would be construed as attempting to obtain on immediate sale that which would be constitutionally unobtainable on subsequent resale. Such would be the effect notwithstanding the fact that the unlicensed status under the Act of purchasing post exchanges, induced by constitutional exemption, and what would be the opposing status of other purchasing retail merchants, induced by a license under the Act, have no bearing whatsoever upon their purchasing characters in immediate sales to them, but relate wholly to their respective nontaxable and taxable characters under the Act in subsequent resales, neither status affecting either the right or privilege of purchase. It would be the effect even though there is no real or substantial difference between their purchasing characters at the time of purchase, their purposes of buying being the same and the nature of their retail businesses substantially the same, and even though there is no reasonable or tenable distinction to be found in the facts that post exchanges exercised their right of purchase under authorized War Department regulations as a governmental function and other purchasing retail merchants would exercise their privilege of purchase under a license provided by the Act as a proprietary function.

"Governmental" is descriptive of the operative control of the Federal Government over post ex-

changes as its agencies in their performance of functions which, prior to their creation, [151] normally were activities of proprietary interests for the convenience of the Government's armed forces wherever stationed or operating, whereas "proprietary" is descriptive of independent ownership and the conducting of private businesses in dealing with the general public, the difference being a matter of form and not of substance. A Territory or State cannot tax post exchanges as retail merchants, not because such federal agencies perform only governmental functions as an incident of their relationship to the Federal Government, but because they are parts of a department of the Government and to tax those parts would interfere with the constitutional exercise of federal powers in which the States and their citizens as well as the Territory and its citizens are equally interested, the fundamental reason being that those powers have been delegated to the Federal Government for the common good and it may freely and constitutionally exercise them for the benefit of all. Neither can a Territory or State directly burden and impede the Government in its operation of a federal agency, engaged in a trading business normally that of proprietary interests, in a considerably larger proportion than proprietary trading businesses of the same character. In this connection a recent case of the Supreme Court of the United States forcibly brought out that "considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon

federal taxation of State agencies or activities." It rejected "as untenable the distinction between 'governmental' and 'proprietary' interests," stressed by its older cases, and upheld the validity of a nondiscriminatory federal tax upon a State engaged in the business of bottling mineral water, even [152] though such business is conceived by the State to be for the public benefit and "has relation to its conservation policy." (New York et al. v. United States, 90 L. Ed. 265, 268, 270, decided Jan. 14, 1946. See South Carolina v. United States, 199 U. S. 437, 50 L. ed. 261; Helvering v. Powers, 293 U. S. 214, 79 L. ed. 291; Allen v. Regents, 304 U. S. 439, 82 L. ed. 1448.)

There being no real or substantial difference between the actual character as purchasers of post exchanges and other retail merchants, licensed under the Act, nor a reasonable or tenable distinction between the nature of their retail business and the purposes and functions of buying at the time of purchase, it follows that there is none between sales to them when made for purposes of resale as was by the taxpayer while doing a regularly organized wholesale business known to the trade as such, the character of the seller, that of the merchandise sold and that of the subjects taxed being the same. Nor is such state of equality disturbed by the apparent equal treatment under the Act with respect to sales for purposes of resale to constitutionally exempt purchasers and those exempted by the Act itself, post exchanges and other retail merchants, licensed under the Act, constituting a class beyond and with-

out the classifications of those exempted by the Act. The legislature may, with the approval of Congress, exempt any otherwise taxable person and has the power to withdraw the exemption granted either in whole or in part at any time within its discretion as dictated by the equitable and economic necessities of the case. Presumably pursuant thereto, the legislature by enacting Act 141 has with one hand in effect extended exemptions to certain otherwise taxable persons as well as to public utilities of the Territory and its subdivisions and with the other hand partly withheld [153] the full force of such exemptions from such persons as well as impliedly consenting thereto with respect to such public utilities. However, it cannot withdraw nor effectively consent to that which it did not give. Neither can it take away any part of an immunity impliedly granted under the Constitution. The considerations with respect to persons exempted by the Act thus have no relation to those exempted under the Constitution and the fact that the Act would happen to operate equally with respect to sales to them is immaterial. It is only with respect to the unequal operation of the Act, as construed, towards substantially the same purchasers, who are not exempted by the Act and constitute no part of the Territory, that this court should be concerned. The question, therefore, is whether, as contended by the taxpayer, the assessment of the higher rate with respect to sales to post exchanges which are constitutionally exempt on resale, when the lower rate is assessed with respect to sales to such other retail merchants

not so exempt, would constitute a discriminatory tax that directly trespasses upon the immunity impliedly afforded by the Constitution to post exchanges and renders the legislative authority to assess at the higher rate unconstitutional and invalid.

In considering this question the practical operation and effect of the Act under the considered construction at the time of purchase must be determined. It is obvious that the Act would operate to tax gross proceeds of sales to post exchanges at a rate six times greater than that which would be assessed against those to other retail merchants and by so doing would impose upon post exchanges in the exercise of their right of purchase a relatively greater burden than that upon the others in the exercise of their privilege of purchase. In addition, [154] it would place an excessive burden upon the right of purchase of post exchanges that would not be imposed had they not been clothed with an implied constitutional immunity. It likewise is obvious that the effect thereof directly would tend to discourage sales to post exchanges while encouraging those to other retail merchants. Such treatment unquestionably would be unfair and injurious to post exchanges. It would be so marked, in my opinion, as to transcend that which is merely impolitic or improvident. It justifies the inference that the Act as construed would be unfriendly in design, favoring forms of proprietary retail businesses within the Territory which are in competition to government retail businesses. Therefore it is clear to

me that such an ununiform excise tax law would be discriminatory in so far as the exercise of the right of purchase by post exchanges is concerned. This, however, would not be a matter of legislative intent to single out post exchanges nor dependent upon a hostile attitude by the legislature towards them but the result of the construed legislative intent to realize the highest amount of revenue possible under the Act, which is ordinarily the motive behind discriminatory legislation, and the actual operation in affecting a method for making the higher percentage rate applicable in lieu of the lower.

Discrimination is synonymous with an unreasonable distinction. It is the antithesis of fairness. It means, in this case, the unfair placing of an excess of burden upon the right of purchase of post exchanges not placed upon the corresponding privilege of purchase of other retail merchants and which would not be placed with respect to post exchanges had they not been constitutionally exempted from the correlative tax at the higher rate on resale. The Act thus would treat more harshly a right [155] which the Territory did not give than a privilege extended by it. Had the purchasing post exchanges not been so exempt, the only rate that would be assessable against them under the Act would be the higher percentage rate. In that case, the Act would operate uniformly and nondiscriminately towards them and other retail merchants. However, such is not the case. Post exchanges are so exempt and under the considered construction the Act without

uniformity would operate discriminately towards them in favor of the others, operating in disregard of constitutional immunity of post exchanges and making such immunity the basis of its discriminatory assessment on sales to them. The attendant unfairness and favoritism thereof on immediate sales to such purchasers would not be cured by the effect of the Act's unequal operation upon their divergent states of taxability on subsequent resales by them nor is it an answer to say that the two inequalities would give an overall tax burden to the other purchasing retail merchants that would be greater by a relative one-quarter per cent than that of post exchanges. The obvious answer is that such a burden upon the other retail merchants should be proportionately greater by a relative one and one-half per cent if the constitutional exemption of post exchanges from that rate is to be justly respected. However, it is not for this court to indulge in mathematical speculations or attempt to balance differences in the overall ultimate burdens of purchasers who are substantially the same, but it should confine itself to the question at hand respecting the particular and immediate sales under consideration where there undeniably would be a marked excess of burden inflicted upon the right of purchase of post exchanges not imposed upon the comparable privilege of other retail merchants nor would be inflicted had [156] the purchasing post exchanges not been constitutionally exempt. There in lies the discriminatory character of the assessment in this case, there being at the time of purchase no real or sub-

stantial difference nor reasonable or tenable distinction between the actual purchasing character, retail business, purpose and function of buying of post exchanges and those of the other retail merchants.

As stated by Mr. Justice Frankfurther in rendering the opinion of the Court in New York et al. v. United States, supra, at page 271 of volume 90 of the Law Edition of United States Reports: "* * * 'discrimination' is not a code of specific but a continuous process of application" and as pointed out by Mr. Justice Holmes in his dissenting opinion in the Panhandle Oil Co. case (the dissent being later in effect sustained) at page 223 of volume 277 of United States Reports, "* * * this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates." Thus, discrimination being a continuous process of application, it follows that if the Territory has the power to fix a discriminatory rate with respect to sales to post exchanges substantially higher than with those to other retail merchants it could fix one still higher and so could the States, thereby effectively expelling post exchanges from territorial and state limits, drying up at its source the necessary flow of merchandise and rendering post exchanges unable to function in defeat of the purpose for which they were created.

It is evident therefrom that the power to fix [157] a discriminatory rate is unlimited and hence the power which destroys. This court, in my opinion, should therefore defeat such an attempt to discriminate and prevent the confiscatory assessments from being applied, the pertinent issue under the considered construction being whether the assessment made by the tax commissioner would trespass upon the implied constitutional immunity of post exchanges as an immediate or direct interference with the Goverment's constitutional powers to operate them under the Constitution. (Const., Art. I, § 8.)

The pith of the majority decision of the Panhandle Oil Co. case is that any state tax on sales to a federal agency, regardless of the character and degree of interference of that tax with government, is unconstitutional and invalid because it infringes upon the implied constitutional immunity of that purchasing agency to have the constitutional independence of the United States remain untrammeled in respect to such purchases, the stated reasons being that "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests" and "The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers" to operate such agency. (Panhandle Oil Co. v. Knox, 277 U. S. 218, 222.) What proved to be the case's point of vulnerability, however, is that it went too far and in-

validated a nondiscriminatory tax. In his dissent thereto, Mr. Justice Holmes pointed to the ground upon which the cases of James v. Dravo Contracting Co., Alabama v. King & Boozer, Curry v. United States and Penn Dairies v. Milk Control Commission, all supra, subsequently overruled its broad holding. This ground he stated at page 225 of volume 277, supra, [158] in the closing sentence of his dissent as follows: "The question of interference with Government, I repeat, is one of unreasonableness and degree and it seems to me that the interference in this case [i. e., that of a nondiscriminatory tax] is too remote." The bracketed explanation is supplied by me not only by reason of an analysis of the enactments considered in the Panhandle Oil Co. case but from the only authority cited by Mr. Justice Holmes in support of the stated ground of dissent. This authority is the case of Metcalf & Eddy v. Mitchell, 269 U. S. 514, wherein the Supreme Court declared on pages 524 and 525 thereof that "The tax is imposed without discrimination upon income whether derived from services rendered to the State or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with Government, or an impairment of the efficiency of its agencies in any substantial way." The reasoning for such a ground is found in the following language of Mr. Justice Holmes' dissent at page 224 of volume 277, supra: "To come down more closely to

the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses."

The Dravo case in holding that a nondiscriminatory state tax upon gross receipts from a contract with the Federal Government is not unconstitutional as a paid tax on the contract itself or as otherwise directly burdening the Government [159] rested its decision squarely upon the authority of the Metcalf & Eddy case, at pages 156 and 157 of volume 302 of United States Reports, and thus adopted the ground upon which Mr. Justice Holmes dissented. Likewise the King & Boozer case, in deciding that the view prevailing in the Panhandle Oil Co. case and its line of cases that a nondiscriminatory tax on sales to a federal agency is unconstitutional has ceased to be tenable, cited as the leading case that of Metcalf & Eddy and relied on the Dravo case. Also the Curry case, companion to that of King & Boozer, rested its decision on the King & Boozer case. Furthermore the Penn Dairies case at page 269 of volume 318 of United States Reports, in deciding that "the mere fact that nondiscriminatory taxation of the contractor imposes an increased economic burden on the Government is no longer regarded as bringing the contractor within any implied immunity of the Gov-

ernment from state taxation or regulation," relied upon the Metcalf & Eddy, Dravo and King & Boozer cases. Thus the pivotal point of these cases in overruling the one of Panhandle Oil Co. is the nondiscriminatory character of the taxes upheld by them. They lay down the general rule that there is no implied constitutional immunity of the Government and its agencies from nondiscriminatory state taxation upon persons dealing with them, the converse thereof by necessary implication being that there is such an immunity from discriminatory state taxation.

By making no distinction whatsoever in the character of the state tax enactments considered and none in the degree of interference with government, it stands to reason that the majority opinion of the Panhandle Oil Co. case (which condemned as unconstitutional an operation of statute that was in fact [160] equally disposed to purchasing federal agencies and all other purchasers and passed upon them a fair economic burden, incidental and normal, involving but a remote interference with government) necessarily included within its condemnation an unfair and injurious operation to purchasing federal agencies that passes to them an excessive economic burden not borne by other competitive purchasers and would not be borne by the federal agencies had they not been exempt under the Constitution, which is proximate and abnormal involving a direct and destructive interference with government. The significance of such inclusion is brought into bold relief by the overruling of that

majority opinion, which in effect removed nondiscriminatory state taxes from the otherwise authoritative holding of the Panhandle Oil Co. case. It is evident that it was overruled only with respect to such taxes and their lower degree of interference with government, the overruling thereby being limited to that character of taxes and degree and not affecting the majority opinion with respect to discriminatory taxes and their higher degree of interference with government. It is apparent, therefore, that the reasoning of the majority opinion in the Panhandle Oil Company case, advanced by the court to establish a direct interference with government, is unimpaired when applied to a discriminatory tax and hence controls the question presented, decisive of the pertinent issue, that discriminatory tax directly impedes, retards and burdens the constitutional exercise of the powers of the Government to maintain its agencies. Thus the Panhandle Oil Co. case, construed in the light of the implied converse of the rule, subsequently laid down by the Supreme Court, as well as in the light of the consideration of fair dealing and equality which have been the philosophy of this nation since its inception, is an authority for the rule of law that a discriminatory tax by State or Territory [161] upon sales to a federal agency is unconstitutional and invalid as a direct infringement upon the constitutional exercise of the powers of the United States to operate such an agency. This authority is squarely in point. There is no need, therefore, to go further by way of analogy and draw a parallel of corresponding effect from the

wealth of authorities pertaining to the unconstitutionality of including other forms of implied constitutional immunity within the measure of a tax (see Missouri v. Gehner, 281 U. S. 313, 74 L. ed. 870; Nat'l. Life Ins. Co. v. United States, 277 U. S. 508, 72 L. ed. 968; Miller v. Milwaukee, 272 U. S. 713, 71 L. ed. 487; Northwestern Ins. Co. v. Wisconsin, 275 U. S. 136, 72 L. ed. 203; Macallen Co. v. Massachusetts, 279 U. S. 620, 73 L. ed. 874), or to the unconstitutional discrimination, violative of the guarantee of "equal protection of the laws" under the Fourteenth Amendment of the Constitution, of making the character of the taxpayer exercising a privilege the basis for a higher tax than that upon competitive others under similar circumstances exercising the same privilege. (See Southern Railway Co. v. Greene, 216 U. S. 400, 54 L. ed. 536; Bethlehem Motors Co. v. Flynt, 256 U. S. 421, 65 L. ed. 1029; Quaker City Cab Co. v. Penna, 277 U. S. 389, 72 L. ed. 927; Concordia Fire Ins. Co. v. Illinois, 292 U. S. 535, 78 L. ed. 1141.)

For the reasons assigned herein the discriminatory assessment at the higher rate with respect to the case of the taxpayer in selling to post exchanges is the direct result of the statutory construction considered. It renders, in my opinion, the assessment thereof unconstitutional and invalid. I cannot perceive, however, that the legislature intended to enact a void provision, it being presumed to intend that which is constitutional and valid. To my mind the legislature intended to [162] enact a uniform excise tax law without discrimination.

The employment by the legislature of the adjective "licensed" in modifying the purchasing "retail merchant" in order to make applicable the lower rate to the case of a wholesaler is susceptible to a more reasonable and less narrow construction and which is not confined wholly to the strict statutory sense of the adjective in securing a license under the Act. It is that the purchaser must be a retail merchant who is lawfully permitted by proper authority to carry on a retail business within the Territory which without such permission would be illegal. In this connection it is significant that the Act defines neither the adjective "licensed" nor the noun "license." Hence the plain, ordinary and accepted meaning of the adjectives must be taken as the one intended. This meaning is that a licensed purchaser is one who has "Authority or liberty given to do or forbear any act; permission to do something (specified); esp., a formal permission from the proper authorities to perform certain acts or to carry on a certain business which without such permission would be illegal; also, the document embodying such permission * * *." (Webster's International Dictionary, 2d ed.) Applying it to the facts concerning post exchanges, it is very evident that they come completely within it. They have the permission in the form of Army Regulations of the War Department, pursuant to congressional enactments (16 Stat. 315, 319; 18 Stat. 337), to carry on retail businesses within the Territory from the United States as the proper authority under the Constitution, the authorized War Department reg-

ulations being the document embodying such permission and having the force of law. Post exchanges are therefore duly licensed retail merchants. Any contention of difference between [163] them and the other retail merchants would be purely fanciful, nor can it be reasonably argued that the legislature ever intended to classify wholesale sales made to retail merchants, duly licensed within the Territory by the War Department in accordance with federal law under the Constitution, differently from those made to retail merchants duly licensed by the tax commissioner in accordance with territorial law under the Act, both purchasers being retailers who are equally law abiding.

Construing the adjective "licensed" in conformity with its plain, ordinary and accepted meaning, the Act is a uniform excise tax law with respect to wholesale sales and operates without discrimination in making applicable the lower rate to the case of a wholesaler. It does so equitably with respect to wholesale sales made to all licensed retail merchants within the Territory, regardless of the source of the purchasers' permission to carry on retail businesses therein so long as it is derived from a proper authority and without such permission the conduct thereof would be illegal. Thus construed the Act does not infringe upon or disregard the implied constitutional immunity of purchasing post exchanges engaged in the retail business in the exercise of their right to buy at wholesale within the Territory for purposes of resale. The resultant economic burden passed to them is a remote and fair one as a normal incident of the tax which rests in the same

proportion upon all purchasers similarly engaged and exercising comparable rights or privileges who are not exempted by the Act and constitute no part of the Territory, the validity of the tax so assessed at the lower rate not being dependent upon that burden's ultimate resting place. It is well settled that such a nondiscriminatory assessment of a uniform excise tax is constitutional and valid. (James v. Dravo Contracting Co., [164] Alabama v. King & Boozer, Curry v. United States, Penn. Daries v. Milk Control Comm'n., all supra; Western L. Co. v. State Board of Equalization, 11 Calif. [2d] 156, 78 P. [2d] 731; Federal Land Bank v. DeRochford, 69 N. D. 382, 297 N. W. 522; Compress of Union v. Stone, 188 Miss. 49, 193 So. 329.) In my opinion this reasonable construction reflects the true legislative intent of the Act, consonant with its constitutionality and validity, and should be adopted.

I concur in the result of the majority opinion with respect to the tax upon the taxpayer's gross proceeds of sales, made for use and consumption, to the United States but dissent therefrom for the reasons stated with respect to the other tax upon his sales, made for purposes of resale, to post exchanges.

In my opinion the cause should be remanded below with instructions to set aside the judgments and enter ones in favor of the taxpayer for recovery of the excess of the tax paid over the assessment at the rate of one quarter of one per cent against his gross proceeds of post exchange sales.

/s/ LOUIS LE BARON.

[Endorsed]: Filed March 4, 1946. [165]

In the Supreme Court of the Territory of Hawaii

No. 2581

THOMAS H. BRODHEAD,
Plaintiff, Defendant-in-Error,
vs.
WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,
Defendant, Plaintiff-in-Error.

No. 2583

THOMAS H. BRODHEAD, d.b.a. T. H. BRODHEAD CO.,
Plaintiff, Defendant-in-Error,
vs.
WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,
Defendant, Plaintiff-in-Error.

Action To Recover Gross Income Taxes Paid Under Protest

Error To Circuit Court, First Judicial Circuit, Honorable J. A. Matthewman, Fifth Judge, Presiding

PETITION FOR REHEARING

Comes now the above-named Plaintiffs, Defendants-in-Error, Thomas H. Brodhead and Thomas H. Brodhead, d.b.a. T. H. Brodhead Co., being

aggrieved by the decision of this Honorable Court, filed March 5, 1946, reversing the judgments of the court below and remanding these causes for a new trial, and presents his petition for a rehearing of the above-entitled causes, and, in support thereof, respectfully shows: [167]

I.

That although urged to do so by counsel for Plaintiffs, Defendants-in-Error, this Court has omitted from consideration in its opinion filed in the above-entitled causes on March 4, 1946, the proposition that the Territory of Hawaii cannot lawfully impose a tax on sales to post exchanges and ships' service stores at a higher rate with respect to such sales than with respect to sales to other retail merchants as an indirect way of doing what cannot be done directly under the Constitution of the United States.

The Opinion of the Court by a statement of its conclusions (on page 1 thereof) affirms the proposition that a tax, the legal effect of which is to lay a direct and immediate tax upon the instrumentalities of the United States, is within the implied prohibition of the Constitution of the United States against laying a burden upon or interfering with federal activities even though imposed under the guise of an excise tax. It is submitted that the Territorial excise tax under consideration is a direct and immediate tax upon an instrumentality of the United

States within the foregoing proposition by reason of the administrative application of the taxing act and not merely by reason of the fact that in its incidence it might indirectly reach a federal instrumentality. As specially pointed out by the dissenting Associate Justice in his opinion (on page 22 thereof) the majority decision of the Panhandle Oil Co. case stands as good authority for its statements that "It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests" and "the necessary operation of these enactments [168] when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers" to operate such agency. (Panhandle Oil Co. vs. Knox, 277 U. S. 218, 222). In other words, the tax involved in these cases is a direct tax on the sale and purchase in the transfer of goods from the taxpayer to post exchanges and ships' service stores. As the legislature could not lawfully impose such a direct tax at a higher rate on sales to post exchanges and ships' service stores than to other retail merchants, it is urged that administrative authority cannot so apply the taxing act. In the cases under consideration, the administrative application of the taxing act makes it a direct tax on post exchanges and ships' service stores which discriminates by charging a higher rate on sales to post exchanges and ships' service stores than to other retail merchants merely because they are instrumentalities

of the United States. In fact, it defeats the very reason post exchanges and ships' service stores are operated as instrumentalities of the United States: that of providing a means of supplying articles of necessity and convenience which the government cannot supply, at the lowest possible prices to our citizen Army and Navy personnel, the great majority of whom have been forced to serve their country for very low pay.

This matter is respectfully pointed out without intent to argue with the Court's opinion, but to focus the Court's attention on its failure to consider the argument and the cases cited beginning on page 45 of the Answering Brief of Plaintiff, Defendant-in-Error, heretofore filed herein, that the tax involved is a direct tax resulting from administrative application which attempts to do by indirection [169] that which could not be done directly.

II.

That in viewing Act 141, Session Laws of Hawaii 1935, as a classification to taxpayers by the legislature and an assessment of a different rate of taxation to each class this Court has failed to consider whether this classification is a "proper classification" not resulting in discrimination.

This Court has found that the legislature in enacting Section 2, B, of Act 141, Session of Law of Hawaii 1935, has classified taxpayers. For example,

"wholesalers," as defined by the Act, is a class separate from and carved out of "every person" as a class, the one being taxed at the rate of one-quarter of one per cent and the other at the rate of one and one-half per cent. The Court has also reiterated the well-settled rules that the legislature has the power to classify for the purposes of taxation and that diversity of rate of taxation based upon "proper classification" is not discrimination. But the majority of the Court has not considered or stated whether the particular application of the tax involved in these cases resulted in a "proper classification," which is a classification without discrimination, as has the dissenting Associate Justice in his exhaustive and carefully reasoned dissent on this point.

The majority of the Court has refused in its reasoning on juridicial discrimination to take the next logical step and recognize that the practical effect of the classification as seen by the Court is to place this taxpayer in a class made up of "every person" who sells to [170] instrumentalities of the United States, which obviously discriminates against the United States. The taxpayer has been held to be "not a 'wholesaler' as defined by the Act;" he is certainly not within the definition of a "retailer" or a "producer" as set forth in the Act; he does not, in the instances under consideration, sell to one specifically exempted by the Act under a grant of an exemption by the Legislature which may at any time be withdrawn by the Legislature. The

taxpayer is then in the only class conceivably left—"every person" who sells to the Federal government.

In finding that factually no discrimination exists against post exchanges and ships' service stores (Opinion of the Court, page 10) the Court has not taken into consideration that which was pointed out in the dissenting opinion that discrimination is not a code of specifics but a continuous process of application. The practical effect of the application of the tax involved to sales to post exchanges and ships' service stores is illustrated when viewed in the light of the times. Although it may not be specifically stated in the record the Court may take notice of this period as one of scarcity of consumer merchandise. Consider what happens when both licensed retailers and post exchanges and ships' service stores are attempting to secure the same merchandise from the taxpayer's warehouses. The taxpayer pays tax, on the one hand, at the rate of one-quarter of one per cent when he sells that merchandise to a retail merchant licensed under the act, and he pays, on the other hand, at the rate of one and one-half per cent (or six times the first rate) when he sells to post exchanges and ships' service stores under the administration of the act by the Territory. To whom is it more profitable for him to sell? Certainly it is obvious that the application of a tax, the practical effect of which is to keep merchandise away from post exchanges and ships' service stores because they are instrumentali-

ties of the United States, render the tax discriminatory in its application. It is respectfully urged that the Court consider this point on a rehearing.

III.

That instead of rendering a final judgment based upon its decision, this Court has acted under a misapprehension of the record in remanding the cause for a new trial, there being nothing apparent in the record to be gained by either party in a new trial.

In this connection, the Court's attention is directed to the record of the trial of these cases in the court below and the Assignments of Errors accompanying the Applications for Writ of Error in each case. The record shows no controversy existed concerning the facts of these cases. It is actually revealed by the record that these cases were submitted to the court below almost entirely on stipulated facts. Recognition of this status of the facts is found in the Assignments of Errors in these cases in that no error is assigned to the trial of the cases but all errors are specifically directed to the judgment of the court below and the decision upon which such judgment was rendered.

Under Section 9564, Revised Laws of Hawaii 1945, this Court may

> ". . . affirm, reverse or modify the order, judgment or sentence of the trial court. It [172] may enter such order, judgment or sentence, or may remand the case to the trial court for

entry of the same or for such other or further proceedings, as in its opinion the facts and law warrant. It may correct any error appearing on the record . . ."

In these cases, where the opinion of the Court may be readily applied to the stipulated facts, it is respectfully submitted that the entry of a final judgment by this Court more properly follows the usual procedure of applying this Court's decision upon Writs of Error.

Wherefore, Plaintiffs, Defendants-in-Error, respectfully pray that this petition for a rehearing be granted, and that the judgment of the Court below be, upon further consideration, affirmed, and that final judgment to that effect be entered by this Honorable Court.

Dated: Honolulu, T. H., March 22, 1946.

THOMAS H. BRODHEAD and
THOMAS H. BRODHEAD d.b.a.
T. H. Brodhead Co., Plaintiffs,
Defendants-in-Error,

By SMITH, WILD, BEEBE &
CADES,
By /s/ MILTON CADES,
Their Attorneys.

CERTIFICATE OF COUNSEL

I, Milton Cades, counsel for the above named Plaintiffs, Defendants-in-Error, do hereby certify

that the foregoing petition for a rehearing of these causes is presented in good faith and not for delay.

/s/ MILTON CADES.

[Endorsed]: Filed March 22, 1946. [173]

In the Supreme Court of the Territory of Hawaii

October Term, 1945

Thomas H. Brodhead v. William Borthwick, Tax Commissioner of the Territory of Hawaii

Nos. 2581 and 2583

DECISION
ON PETITION FOR REHEARING

Filed March 22, 1946. Decided March 27, 1946.

Kemp, C.J.; Peters and Le Baron, J.J.

Per Curiam. This is a petition for rehearing. The opinion in the case to which the motion refers is reported ante on page 314.

Grounds of the motion are as follows:

(1) That the court "omitted from consideration in its opinion * * * the proposition that the Territory of Hawaii cannot lawfully impose a tax on sales to post exchanges and ships' service stores at a higher rate with respect to such sales than with respect to sales to other retail merchants as an indirect way of doing what cannot be done directly under the Constitution of the United States";

(2) That in viewing Act 141, Session Laws of

Hawaii 1935, as a classification of taxpayers by the legislature and an assessment of a different rate of taxation to each class, this court has failed to consider whether this classification is a "proper classification" not resulting in discrimination;

(3) That instead of rendering a final judgment [175] based upon its decision, this court has acted under a misapprehension of the record in remanding the cause for a new trial, there being nothing apparent in the record to be gained by either party in a new trial.

The grounds of the motion will be considered seriatim.

(1) As we interpreted the brief of the taxpayer, repeated upon oral argument, he contended that no tax liability existed but that if there did the applicable rate was one-quarter of one per cent and that the application by the taxing authorities of the higher rate of one and one-half per cent was inconsistent with the plain terms of the Act, unlawful and discriminatory. If under the law the imposition of the higher rate was mandatory and as thus construed was applied by the taxing authorities in assessing the tax, discrimination, if any, was the result of the Act itself and not of any unlawful action on the part of the administrative offices enforcing the Act. We held that the taxpayer was liable to a tax under the Act and that the rate of one-quarter of one per cent applicable to a "wholesaler" did not apply. We further held that under the terms of the Act the rate of one and one-

half per cent applicable to "every person" did apply and that the assessment by the taxing authorities was consistent with the terms of the Act. As a result the objection of discrimination had relation only to the terms of the Act itself and not to the acts of the administrative offices enforcing the Act. If the rate applied was not discriminatory under the law, obviously the law as administered was not discriminatory. The subject of discrimination therefore [176] was treated accordingly and fully discussed. The opinion itself is sufficient refutation of the charge.

(2) This ground seeks to reargue the subject of discrimination upon which the court was divided. The dissent adopted the thesis of the taxpayer; the majority held differently. The composite represents the considered effort of both parties and reargument would serve no useful purpose. A dissent does not rate a rehearing.

(3) Although the better practice seems to be to move to amend the remand, this ground will nevertheless be considered.

The within action is one at law.[1] It was tried jury waived. And is subject to all the provisions of law applicable to actions at law, jury waived, including the requirement that "the court shall hear and decide the cause, both as to the facts and the law, and its decision shall be rendered in writing stating its reasons therefor."[2] The powers of this

[1]R. L. H. 1945, § 9647.

[2]R. L. H. 1945, § 10107.

court upon error to review a judgment in an action at law, jury waived, is purely appellate. It does not include the power to decide the facts.

No error was reserved or assigned requiring or admitting the summary entry of judgment in this court. The power reposed in this court by Revised Laws of Hawaii 1945, section 9564, to enter judgment, as in its opinion the facts and law warrant, should not be invoked by this [177] court of its own motion while the statutory duties of the trial court in respect thereto remain incomplete.

The petition for rehearing is denied without argument.

By the Court:

[Seal] /s/ LEOTI V. KRONE,
Clerk.

SMITH, WILD, BEEBE & CADES,
For the Petition.

Approved:

/s/ S. B. KEMP,
Chief Justice.

/s/ E. C. PETERS,
Associate Justice.

.....
Associate Justice.

[Endorsed]: Filed March 27, 1946. [178]

In the Supreme Court of the Territory of Hawaii

No. 2631

THOMAS H. BRODHEAD, d.b.a. T. H. BRODHEAD CO.,

Plaintiff-Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of the Territory of Hawaii,

Defendant-Appellee.

Action to Recover Gross Income Taxes Paid Under Protest

Error To Circuit Court, First Judicial Circuit
Honorable A. M. Christy, Second Judge, Presiding

PETITION FOR APPEAL

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii:

Comes now, Thomas E. Brodhead, doing business as T. H. Brodhead Co., Plaintiff-Appellant above-named, by his attorneys, Smith, Wild, Beebe & Cades, deeming himself aggrieved by the judgment of the above-entitled Court in the above-entitled cause, which judgment was made and entered on February 25, 1947, and claiming that there are manifest and material errors to the damage of said Thomas H. Brodhead, doing business as T. H. Brodhead Co., in said cause, which errors are specifically set forth in the Assignment of Errors filed

herewith, to which reference is hereby made, and respectfully prays that an appeal may be allowed in the above-entitled cause and that he be allowed to prosecute said appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in accordance with the statutes in such cases made and provided; and that the Clerk of the Supreme Court of the Territory of Hawaii be directed to send the United States Circuit Court of Appeals for the Ninth Circuit a transcript of the record, proceedings and papers in [180] this cause, duly authenticated, for the correction of the errors complained of, and that a citation may issue.

And in this behalf, said Thomas H. Brodhead, doing business as T. H. Brodhead Co., shows that said judgment was rendered on Writ of Error from the judgment of the Circuit Court, First Judicial Circuit, Territory of Hawaii, in the above-entitled Court and cause, and involves the Constitution and the laws of the United States of America, and that the value in controversy, exclusive of interest and costs, exceeds Five Thousand Dollars ($5,000.00).

Dated: Honolulu, T. H., May 22, 1947.

SMITH, WILD, BEEBE & CADES,

By MILTON CADES,

Attorneys for Thomas H. Brodhead, doing business as T. H. Brodhead Co.

Territory of Hawaii,
City and County of Honolulu—ss.

Milton Cades, being first duly sworn, on oath deposes and says: That he is a partner of the firm of Smith, Wild, Beebe & Cades, attorneys for the Plaintiff-Appellant named in the foregoing Petition for Appeal; that he has read the foregoing Petition for Appeal, and that the matters and things therein set forth are true of his own knowledge, and that the value in controversy, exclusive of interest and costs, exceeds $5,000.00.

MILTON CADES.

Subscribed and sworn to before me this 22nd day of May, 1947.

FRIEDA H. ROBERT,
Notary Public, First Judicial Circuit, Territory of Hawaii.

My commission expires 6-30-49.

Service of a copy of the foregoing Petition for Appeal is hereby admitted this 22nd day of May, 1947.

/s/ C. NILS TAVARES,
Attorney General, Territory of Hawaii, Attorney for the Tax Commissioner.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the

office of the Clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., May 22, 1947.

[Seal] GUS SPROAT,
Clerk, Supreme Court, Territory of Hawaii.

[Title of Supreme Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now the above-named Thomas H. Brodhead, doing business as T. H. Brodhead Co., and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in the said cause to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court entered on the 25th day of February, 1947:

(1) The Supreme Court erred in affirming the judgment of the Circuit Court, First Judicial Circuit, Territory of Hawaii, that the Plaintiff-Appellant take nothing by his complaint and dismissing the action, and in failing to set aside the judgment of said Circuit Court.

(2) The Supreme Court erred in holding that the General Excise Tax Law of the Territory of Hawaii (Act 141, Ser. A-44, Sess. Laws of Hawaii 1935, as amended), herein referred to as the "Excise Tax Law," imposes a tax, and for the period from October 1, 1942, through March 31, 1944, did

impose a tax upon the Plaintiff-Appellant with respect to sales of tangible personal property made to the United States Government, its departments and agencies.

(3) The Supreme Court erred in holding that Section 3 of said law did not exempt the plaintiff from tax on the gross proceeds of sales made by him to the United States Government and its post exchanges and Ship's Service Stores.

(4) The Supreme Court erred in failing to hold that the Legislature in enacting said Excise Tax Law intended to exempt from taxation the proceeds of sales to the United States, its departments and agencies.

(5) The Supreme Court erred in holding that the tax as so imposed does not levy a burden upon or interfere with Federal activities.

(6) The Supreme Court erred in failing to hold that said Excise Tax Law so administered as to include the gross receipts from sales to the United States, its agencies or instrumentalities, within the measure of tax, is a tax on the United States which is within the prohibition of the rule against the taxation of a sovereign.

(7) The Supreme Court erred in failing to hold that the tax as so imposed is a direct burden on the Federal Government in the exercise of its essential governmental power of raising and supporting armies and of providing and maintaining a Navy, and that said tax therefore violates Article I, Sec-

tion 8, Clauses 12 and 13, of the Constitution of the United States.

(8) The Supreme Court erred in holding that such tax had only an economic effect upon the United States Government, its departments and agencies, which economic effect is indirect and does not constitute the tax an invalid burden upon or interference with Federal activities. [184]

(9) The Supreme Court erred in holding that the imposition of said tax was and is within the power of the Legislature of the Territory under Section 55 of the Hawaiian Organic Act and not in violation of Article I, Section 8, Clause 12 or 13, or the Fifth Amendment of the Constitution of the United States.

(10) The Supreme Court erred in failing to hold that said tax violates the Fifth Amendment of the Constitution of the United States in that it constitutes a tax on the privilege of doing business with the United States, its agencies or instrumentalities.

(11) The Supreme Court erred in failing to hold that said tax did not violate Section 55 of the Hawaiian Organic Act in that it imposes a direct tax on the privilege of doing business with the United States which is a subject beyond the legislative power of the Legislature of the Territory of Hawaii, in that it is not a rightful subject of legislation and in that it is inconsistent with the Constitution and laws of the United States.

(12) The Supreme Court erred in holding that

the rate of tax imposed by said General Excise Tax Law upon all gross proceeds of sales to the Federal Government and agencies thereof was at the rate of 1½% irrespective of whether such goods were intended to be or were resold by the purchasers.

(13) The Supreme Court erred in holding that the tax imposed by said law upon the gross proceeds of sales to United States Post Exchanges and Ship's Service Stores for the purpose of resale was at a rate higher than ¼ of 1%.

(14) The Supreme Court erred in holding that a tax on sales to Post Exchanges and Ship's Service Stores at a higher rate than on sales to other retailers is not prohibited as an indirect [185] way of doing what cannot be done directly under the Constitution of the United States.

(15) The Supreme Court erred in holding that said tax law required the Tax Commissioner to include in the measure of tax the proceeds of sales to the United States and its agencies at the rate of 1½%.

(16) The Supreme Court erred in holding that the administrative practice, whereby the rate of tax on sales to Post Exchanges and Ship's Service Stores was increased because of a judicial determination that Post Exchanges and Ship's Service Stores could not be constitutionally taxed on their sales, did not show that the purpose of the administrators was to accomplish an unlawful result by an indirect method.

(17) The Supreme Court erred in holding that the classifications made by the Legislature are "natural and reasonable and not discriminatory" against the plaintiff or the Federal Government or its instrumentalities.

(18) The Supreme Court erred in holding that Post Exchanges and Ship's Service Stores are not "merchants" within the meaning of the tax law.

(19) The Supreme Court erred in holding that a tax upon plaintiff at a higher rate on account of its sales to Ship's Service Stores and Post Exchanges for resale than upon its sales to licensed retailers for resale was not discriminatory against the plaintiff or the Federal Government or its instrumentalities.

(20) The Supreme Court erred in holding that the Tax Commissioner did not discriminate in the administration of the tax law against the plaintiff or the Federal Government or its instrumentalities.

(21) The Supreme Court erred in holding in the Decision and Judgment made and entered in this cause that the plaintiff is not entitled to recover the gross income taxes paid by him under protest or any part thereof for the reason that the Legislature specifically exempted such gross proceeds of sales from the tax law; for the further reason that the Legislature is without power to impose a tax upon the proceeds of gross sales to the United States or its instrumentalities; and for the further reason that in no event can the Legislature impose a tax

upon the gross proceeds of sales to Ship's Service Stores and Post Exchanges for resale at a higher rate than that imposed on account of sales to other retailers for resale, namely ¼ of 1%.

(22) The Supreme Court erred in failing to make a judgment in favor of the plaintiff that he recover gross income taxes paid under protest in accordance with his prayer as set forth in the complaint.

Wherefore, Thomas H. Brodhead, doing business as T. H. Brodhead Co., prays that the said judgment of the Supreme Court of the Territory of Hawaii may be reversed, and for such other and further relief as to the Court may seem just and proper.

Dated: Honolulu, T. H., this 22nd day of May, 1947.

SMITH, WILD, BEEBE & CADES,

By MILTON CADES,
Attorneys for Plaintiff-Appellant.

Service of a copy of the foregoing Assignment of Errors is hereby admitted this 22nd day of May, 1947.

/s/ C. NILS TAVARES,
Attorney General, Territory of Hawaii, Attorney for the Tax Commissioner.

I do hereby certify that the foregoing is a full,

true and correct copy of the original on file in the office of the clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., May 22, A.D. 1947.

[Seal] GUS K. SPROAT,
Clerk, Supreme Court, Territory of Hawaii.

[Title of Supreme Court and Cause.]

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND

Upon reading and filing the verified Petition for Appeal presented to this Court by Thomas H. Brodhead, doing business as T. H. Brodhead Co., in which he prays that an appeal may be allowed him to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of this Court made and entered in the above entitled Court and cause on February 25, 1947, wherein it is alleged that manifest and material errors have occurred, to the end that said errors, if any there be, may be speedily corrected and justice done in the premises; and upon said Thomas H. Brodhead, doing business as T. H. Brodhead Co., filing an Assignment of Errors, together with said Petition for Appeal, and together with a bond for costs in the sum of Two Hundred Fifty Dollars ($250.00);

It Is Hereby Ordered that said appeal to the United States Circuit Court of Appeals for the

Ninth Circuit be and the same is hereby allowed, and that said bond for costs in the amount of Two Hundred Fifty Dollars ($250.00), filed by said Thomas H. [189] Brodhead, be and it is hereby approved.

Dated: Honolulu, T. H., May 22, 1947.

[Seal] /s/ S. B. KEMP,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Attest:

[Seal] LEOTI V. KRONE,
Clerk.

Service of a copy of the foregoing Order Allowing Appeal and Fixing Amount of Bond is hereby admitted this 22nd day of May, 1947.

/s/ C. NILS TAVARES,

Attorney General, Territory of Hawaii, Attorney for William Borthwick, Tax Commissioner.

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of the Territory of Hawaii.

Dated at Honolulu, T. H., May 22, 1947.

/s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii. [190]

[Endorsed]: Filed May 22, 1947.

[Title of Supreme Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents:

That Thomas H. Brodhead, as principal and Pacific Insurance Co., Ltd., a Hawaiian corporation, as surety, are held and firmly bound unto William Borthwick, Tax Commissioner of the Territory of Hawaii, Defendant-Appellee, in the sum of $250.00 for the payment of which well and truly to be made, said Thomas H. Brodhead, as principal and Pacific Insurance Co., Ltd., as surety, do bind themselves, their respective heirs, executors, administrators, successors and assigns, jointly and severally, and firmly by these presents.

The Condition of This Obligation Is Such That:

Whereas the above bounden principal, Thomas H. Brodhead, doing business as T. H. Brodhead Co., has filed its Petition for an Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled cause by the Supreme Court of the Territory of Hawaii; [192]

Now, Therefore, if the said principal shall prosecute said appeal with effect and answer all costs if he fails to sustain said appeal, then this obligation shall be void, otherwise it shall remain in full force and effect.

In Witness Whereof, said Thomas H. Brodhead has hereunto set his hand, and said Pacific Insurance Co., Ltd., has caused its name to be signed and

the corporate seal affixed by its proper officers thereunto duly authorized this 21st day of May, 1947.

/s/ THOMAS H. BRODHEAD,
Principal,

PACIFIC INSURANCE CO., LTD.,
By /s/ GEO. H. McDONOUGH,
Its Treasurer.

[Seal] By .....,
Its Surety.

The foregoing bond is hereby approved as to form, amount and sufficiency of surety.

/s/ SAMUEL B. KEMP,

Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the foregoing Bond on Appeal is hereby admitted this 22nd day of May, 1947.

/s/ C. NILS TAVARES,

Attorney General, Territory of Hawaii, Attorney for William Borthwick, Tax Commissioner.

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of the Territory of Hawaii.
Dated May 22, 1947.

/s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Endorsed]: Filed May 22, 1947.

[Title of Supreme Court and Cause.]

CITATION ON APPEAL

The United States of America—ss.

The President of the United States of America to William Borthwick, Tax Commissioner and Tax Collector of the Territory of Hawaii, and to the Attorney General of the Territory of Hawaii, his Attorney, Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, State of California, within forty (40) days from the date of this citation, pursuant to an appeal duly allowed and filed in the Office of the Clerk of the Supreme Court of the Territory of Hawaii on May 22, 1947, in said cause, wherein Thomas H. Brodhead, doing business as T. H. Brodhead Co., is appellant, and you are appellee, to show cause, if any there be, why the judgment made and entered in the Supreme Court of the Territory of Hawaii on February 25, 1947, should not be corrected and speedy justice done to the parties in [195] that behalf.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States of America, this 22nd day of May, 1947.

[Seal] /s/ SAMUEL B. KEMP

Chief Justice of the Supreme Court of the Territory of Hawaii.

Attest:

[Seal] LEOTI V. KRONE
Clerk.

Service of the foregoing Citation of Appeal is hereby admitted this 22nd day of May, 1947.

/s/ C. NILS TAVARES

Attorney General, Territory of Hawaii, Attorney for William Borthwick, Tax Commissioner.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the office of the clerk of the Supreme Court of the Territory of Hawaii.

Dated May 22, 1947.

/s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Endorsed]: Filed May 22, 1947.

[Title of Supreme Court and Cause.]

AMENDED PRAECIPE

To Leoti V. Krone, Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in the above entitled cause, to be filed in the office

of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following, which are on file in said cause, to wit:

(1) Complaint, Exhibit "A" and Summons.

(2) Answer.

(3) Stipulation dated June 24, 1944, and Exhibits "B" to "D," inclusive.

(4) Decision of Honorable A. M. Cristy, Judge, Circuit Court, First Judicial Circuit, filed May 15, 1946.

(5) Judgment of Circuit Court filed May 15, 1946.

(6) Reporter's' transcript of proceedings.

(7) Reporter's transcript of proceedings in the Matter of Thomas H. Brodhead vs. William Borthwick, Law No. 16,956, Circuit Court of the First Judicial Circuit, Pages 1 to 30.

(8) All Exhibits in Law No. 16,956.

(9) Writ of Error filed in Supreme Court, Territory of Hawaii.

(10) Assignment of Errors to the judgment of the Circuit Court.

(11) Stipulation re submission without oral argument, filed February 24, 1947.

(12) Decision of Supreme Court, filed February 25, 1947.

(13) Judgment of Supreme Court, filed February 25, 1947.

(14) Opinion of Supreme Court in Nos. 2581 and 2583, together with Petition for Rehearing and Decision thereon.

(15) Petition for Appeal.

(16) Assignment of Errors.

(17) Order Allowing Appeal and Fixing Amount of Bond.

(18) Bond on Appeal.

(19) Citation on Appeal.

(20) All orders enlarging time to docket cause in the Ninth Circuit Court of Appeals.

(21) This Amended Praecipe.

Dated: Honolulu, T. H., this 26th day of June, 1947.

SMITH, WILD, BEEBE & CADES

By /s/ MILTON CADES

Attorneys for Plaintiff-Appellant.

Service of a copy of the foregoing Amended Praecipe is hereby admitted this 28th day of June, 1947, and consent is hereby given to the amendment of the Praecipe originally filed in the form above set forth.

/s/ RHODA V. LEWIS

Assistant Attorney General, Territory of Hawaii, Attorney for Tax Commissioner.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in the

office of the clerk of the Supreme Court of the Territory of Hawaii.

Dated June 27, 1947.

/s/ LEOTI V. KRONE,
Clerk, Supreme Court,
Territory of Hawaii.

[Endorsed]: Filed June 27, 1947.

[Title of Supreme Court and Cause.]

ORDER EXTENDING TIME TO AUG. 15, 1947

Good cause appearing therefor,

It Is Hereby Ordered that plaintiff-appellant herein may have to and including August 15, 1947, within which to file his record on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Honolulu, T. H., June 27, 1947.

[Seal] /s/ SAMUEL B. KEMP
Chief Justice, Supreme Court,
Territory of Hawaii.

[Endorsed]: Filed June 27, 1947.

[Title of Supreme Court and Cause.]

CLERK'S CERTIFICATE TO CERTIFIED RECORD ON APPEAL

I, Leoti V. Krone, clerk of the supreme court of

the Territory of Hawaii, do hereby certify that the foregoing documents, attached hereto, and listed in the index herein, are full, true, and correct copies of certified copies and of originals on file in the above-entitled court and cause.

I further certify that the cost of the foregoing transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit is $202.74, and that said amount has been paid by the attorneys for appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the supreme court of the Territory of Hawaii at Honolulu, this 11th day of July, 1947.

[Seal] /s/ LEOTI V. KRONE
Clerk.

[Endorsed]: No. 11688. United States Circuit Court of Appeals for the Ninth Circuit. Thomas H. Brodhead, doing business as T. H. Brodhead Co., Appellant, vs. William Borthwick, Tax Commissioner and Tax Collector of the Territory of Hawaii, Appellee. Transcript of Record. Upon Appeal from the Supreme Court for the Territory of Hawaii.

Filed July 14, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11688

THOMAS H. BRODHEAD, doing business as
T. H. Brodhead Co.,

Appellant,

vs.

WILLIAM BORTHWICK, Tax Commissioner of
the Territory of Hawaii,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD

Comes now Thomas H. Brodhead, doing business as T. H. Brodhead Co., Appellant herein, by and through his attorneys, Urban E. Wild and Milton Cades, and in compliance with Subdivision 6 of Rule 19 requiring a concise statement of the points on which Appellant intends to rely on the appeal, hereby adopts as the points on appeal the Assignment of Errors appearing in the transcript of the record, and, in compliance with the rules of this Court pertaining to the designation of the portion of the record to be printed, directs that the entire Record on Appeal, as set forth in the Amended Praecipe heretofore filed with the Clerk of the Supreme Court of the Territory of Hawaii with the request that copies of the record as so designated

be prepared and transmitted to this Court, be printed as the record on review.

Dated at Honolulu, T. H., July 14th, 1947.

/s/ URBAN E. WILD,
/s/ MILTON CADES,
Attorneys for Appellant.

Of Counsel:

SMITH, WILD, BEEBE & CADES,
Fourth Floor, Bishop Trust Building,
Honolulu, T. H.

Service of a copy of the foregoing Statement of Points and Designation of Parts of Record is hereby admitted this 14th day of July, 1947.

/s/ RHODA V. LEWIS,

Acting Attorney General, Territory of Hawaii,
Attorney for Tax Commissioner.

[Endorsed]: Filed July 17, 1947.